Docket for 03-218

No. 03-218 Status: ARGUED
Title: John D. Ashcroft, Attorney General, Petitioner
v.
American Civil Liberties Union, et al.
Docketed: August 11, 2003
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (99-1324)
Decision Date: March 6, 2003
Rehearing Denied: May 13, 2003

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 11 2003	Petition for writ of certiorari filed. (Response due September 10, 2003)
Aug 11 2003	Appendix of John D. Ashcroft, Attorney General filed.
Sep 10 2003	Brief of respondent American Civil Liberties Union, et al. in opposition filed.
Sep 24 2003	DISTRIBUTED for Conference of October 10, 2003.
Sep 26 2003	Reply of petitioner John D. Ashcroft, Attorney General filed. (Distributed)
Oct 14 2003	Petition GRANTED.
Nov 26 2003	Brief amici curiae of Focus on the Family and Family Research Council filed.
Nov 28 2003	Brief amicus curiae of DuPage County, Illinois filed.
Dec 1 2003	Brief amicus curiae of Morality In Media, Inc. filed.
Dec 3 2003	Motion to dispense with printing the joint appendix filed by the Solicitor General.
Dec 8 2003	Motion to dispense with printing the joint appendix filed by the Solicitor General GRANTED.
Dec 10 2003	SET FOR ARGUMENT Tuesday, March 2, 2004.
Dec 10 2003	Brief of petitioner John D. Ashcroft, Attorney General filed.
Dec 10 2003	Brief amici curiae of American Center for Law and Justice, et al. filed.
Dec 10 2003	Brief amici curiae of John S. McCain, Michael G Oxley, James C. Greenwood, Thomas J. Bliley, Jr. filed.
Dec 10 2003	Brief amicus curiae of Wallbuilders, Inc. filed.
Dec 17 2003	CIRCULATED.
Jan 12 2004	Letter of amici American Society of Journalists and Authors, et al. proposing a lodging.
Jan 13 2004	Record received from the U.S.C.A. for the 3rd Circuit. (1 envelope)
Jan 13 2004	Brief amici curiae of American Society of Journalists and Authors, et al. filed. (Distributed)
Jan 14 2004	Brief amici curiae of Association of American Publishers, Inc., et al. filed. (Distributed)
Jan 14 2004	Brief amici curiae of Volunteer Lawyers for the Arts, et al. filed. (Distributed)
Jan 14 2004	Brief of respondents American Civil Liberties Union, et al. filed. (Distributed)
Jan 15 2004	LODGING consisting of twenty-five copies each, of District Court supplemental material and two volumes of appellate material received from counsel for the petitioner 12/19/03. This lodging was approved and distributed.
Jan 27 2004	Record received from the U. S. District Court for the Eastern District of Pennsylvania. (1 box) A portion of the Record is under seal.
Feb 18 2004	Reply of petitioner John D. Ashcroft, Attorney General filed. (Distributed)
Mar 2 2004	Argued. For petitioner: Theodore B. Olson, Solicitor General, Department of Justice,

Washington, D.C. For respondents: Anne E. Beeson, New York, N.Y.

FILED
AUG 11 2003

No. 03 218

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ A Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, Blackstripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	13
I. The court of appeals has invalidated an Act of Congress	14
II. The court of appeals erred in holding COPA unconstitutional	15
A. COPA is narrowly tailored	16
B. There is no alternative to COPA that is equally effective	25
C. COPA is not substantially overbroad	28
III. The question presented is ripe for review	29
Conclusion	30

TABLE OF AUTHORITIES

Cases:

American Booksellers Ass'n v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990)	15, 18
American Booksellers v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991)	15, 20
Ashcroft v. *ACLU*, 535 U.S. 564 (2002)	9, 10, 28, 30
Commonwealth v. *American Booksellers Ass'n*, 372 S.E.2d 618 (1988)	16, 19
Crawford v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997)	15
Davis-Kidd Booksellers, Inc. v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993)	15, 19-20
Evans v. *United States*, 504 U.S. 255 (1992)	17, 19
Ginsberg v. *New York*, 390 U.S. 629 (1968)	4, 16, 18
Hamling v. *United States*, 418 U.S. 87 (1974)	18

Cases—Continued: Page

Kois v. *Wisconsin*, 408 U.S. 229 (1972) 17
M.S. News Co. v. *Casado*, 721 F.2d 1281 (10th Cir. 1983) 15
Miller v. *California*, 413 U.S. 15 (1973) 4, 9-10, 17
Reno v. *ACLU*, 521 U.S. 844 (1997) 2, 3, 5, 6, 27
Roth v. *United States*, 354 U.S. 476 (1957) 17, 18
United States v. *American Library Ass'n*, 123 S. Ct. 2297 (2003) 23, 24
United States v. *Armstrong*, 517 U.S. 456 (1996) 24
United States v. *Chemical Found. Inc.*, 272 U.S. 1 (1926) 24-25
United States v. *Gainey*, 380 U.S. 63 (1965) 15
United States v. *Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) 25, 26
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 18
Upper Midwest Booksellers Ass'n v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) 15
Virginia v. *Hicks*, 123 S. Ct. 2191 (2003) 28

Constitution and statutes:

U.S. Const.:
Amend. I ..... *passim*
Amend. V 7
Child Online Protection Act, Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 3
Children's Internet Protection Act, 114 Stat. 2763A-335 23
Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133 2
47 U.S.C. 223(b) 2
47 U.S.C. 223(d) 2
47 U.S.C. 223(e)(5) 2
47 U.S.C. 230(d) 27
47 U.S.C. 231 3

Statutes—Continued: Page

47 U.S.C. 231 note 3
(Finding 1) 6, 26
(Finding 2) 7
(Finding 3) 7
(Finding 4) 7
47 U.S.C. 231(a)(1) 3, 5, 6, 12
47 U.S.C. 231(c)(1) 5, 21
47 U.S.C. 231(d)(1) 22
47 U.S.C. 231(e)(2) 6
47 U.S.C. 231(e)(2)(A) 3, 12, 20
47 U.S.C. 231(e)(2)(B) 4, 12, 20
47 U.S.C. 231(e)(6) 4, 11, 16, 17, 18
47 U.S.C. 231(e)(6)(A) 4, 6
47 U.S.C. 231(e)(6)(B) 4, 6
47 U.S.C. 231(e)(6)(C) 4, 6
47 U.S.C. 231(e)(7) 6, 11, 19
47 U.S.C. 501 22

Miscellaneous:

H.R. Rep. No. 775, 105th Cong., 2d Sess. (1998) 4, 5, 6, 19, 25, 26
Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomm., Trade and Consumer Prot. of the House Comm. on Commerce, 105th Cong., 2d Sess. (1998) 3
S. Rep. No. 225, 105th Cong., 2d Sess. (1998) 3, 5, 6

In the Supreme Court of the United States

No.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-66a) is reported at 322 F.3d 240. An earlier opinion of the court of appeals (App., *infra*, 67a-105a) is reported at 217 F.3d 162. The opinion of the district court (App., *infra*, 106a-166a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting a temporary restraining order (App., *infra*, 167a-180a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2003. A petition for rehearing was denied on May 13, 2003 (App., *infra*, 181a-182a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to this petition. App., *infra*, 183a-191a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(b), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d). The CDA provided a defense to prosecution to persons who had "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to covered communications. 47 U.S.C. 223(e)(5).

In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The

Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

b. Congress reexamined the problem of children's access to sexually explicit material on the Internet in light of this Court's decision in *Reno* v. *ACLU*. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomm., Trade and Consumer Prot. of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); see S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid.*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231, 231 note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of [his] trade or business, with the objective of earning

a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24; see H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require

that such materials be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id.* at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1).

c. In crafting COPA, Congress sought to "address[] the specific concerns raised by" this Court when it invalidated the CDA. See H.R. Rep. No. 775, *supra*, at 12; see also S. Rep. No. 225, *supra*, at 2. First, the CDA applied to communications through e-mail, newsgroups, and chat rooms, and age screening was found not to be technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, identifies the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and it is specifically

limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA applies only to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford the cost of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.[1]

d. Congress enacted legislative findings that explain the basis for COPA. Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that

[1] COPA also reduces the age of minority from under age 18 to under age 17 and makes clear that parents do not violate the Act when they permit their minor children to use the family computer to view material covered by the Act. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

"the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

2. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. App., *infra*, 114a-115a. The district court entered a temporary restraining order prohibiting the government from enforcing the Act. *Id.* at 178a-180a. The district court later entered a preliminary injunction preventing enforcement of the Act, reasoning that COPA likely violates the First Amendment. *Id.* at 164a-166a.

Many of the district court's findings support COPA's constitutionality. The district court found that pornographic material is widely available on the Web and that minors can readily obtain access to it. App., *infra*, 156a. The court also found that readily available adult identification systems enable Web publishers to pre-

vent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web publishers can place harmful material behind screens that allow access to the material only when the user provides a valid credit card number. *Id.* at 138a-140a. The court also noted that one company, Adult Check, provides (at no cost to the Web publisher) a script that can be placed anywhere the publisher wishes to prevent access by minors. *Id.* at 141a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase an adult personal identification (adult ID), return to the original site, and use the ID to obtain access to the site. *Id.* at 141a-142a. The court cited testimony that approximately three million people possess a valid Adult Check ID, and 46,000 Web sites accept them. *Id.* at 142a. The court also found that Web businesses can segregate the harmful material from their sites behind age verification screens, leaving other material on the site to be viewed by all users. *Id.* at 138a, 143a.

Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. App., *infra*, 156a. In support of that conclusion, the court found only that respondents were likely to establish at trial that the placement of adult screens in front of material that is harmful to minors "may deter" some users from seeking access to such materials and that the loss of users "may affect" some Web posters' economic ability to provide such communications. *Id.* at 155a.

The district court also concluded that the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to harmful

material without imposing the same burden on constitutionally protected speech. App., *infra*, 160a. The court acknowledged that software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 148a, 160a. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 148a. The court found it more significant, however, that software can block material on foreign Web sites and material outside the Web, and that some minors may be able to obtain access to credit cards and adult IDs. *Id.* at 148a, 159a.

The court of appeals affirmed on a different ground. App., *infra*, 67a-105a. It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA facially unconstitutional, because it effectively requires persons who display material on the Web to comply with the community standards of the least tolerant community. *Id.* at 69a.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585.

In a plurality opinion, Justice Thomas, joined by the Chief Justice and Justice Scalia, concluded that "[b]ecause Congress has narrowed the range of content restricted by COPA in a manner analogous to [the] definition of obscenity" set forth in *Miller* v. *California*,

413 U.S. 15 (1973), "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment." 535 U.S. at 584-585.

Justice O'Connor concurred in part and concurred in the judgment. 535 U.S. at 586-589. She agreed with the plurality that "even under local community standards, the variation between the most and least restrictive communities is not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad." *Id.* at 586. She nonetheless concluded that COPA should be interpreted to incorporate a "national standard." *Id.* at 587.

Justice Breyer also concurred in part and concurred in the judgment. 535 U.S. at 589-591. He concluded that Congress intended the term community standards to refer to a national standard, *id.* at 590, and that any regional variations in the application of that standard "are not, from the perspective of the First Amendment, problematic." *Id.* at 591.

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, concurred in the judgment. 535 U.S. at 591-602. They concluded that it cannot be known "whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech." *Id.* at 597.[2]

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunction. App., *infra*, 1a-66a. Based on a series of considerations, the court held that COPA violates the First Amendment. *Id.* at 19a-49a.

[2] Justice Stevens dissented. 535 U.S. at 602-612. He concluded that COPA's use of community standards to identify material harmful to minors renders the statute facially unconstitutional. *Ibid.*

The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions, the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. App., *infra*, 21a-22a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." App., *infra*, 22a.

The court next concluded that COPA's "serious value" prong lacks sufficient precision. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web publishers cannot know which minors should be considered in deciding whether material has serious value for minors. App., *infra*, 24a. The court rejected the government's argument that the question under COPA is whether material has serious value for a legitimate minority of normal older adolescents. *Ibid.* The court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, *id.* at 25a-26a n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. *Id.* at 25a-27a.

The court also concluded that even if COPA incorporates the normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." *Id.* at 28a.

The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow COPA's reach. App., *infra*, 28a. The court criticized COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material, even if they do not post such material "as the principal part of their business," and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. *Id.* at 29a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." App., *infra*, 31a.

The court of appeals further held that while COPA affords an affirmative defense to businesses that use credit cards or adult IDs to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected speech. App., *infra*, 32a-37a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is

sensitive or controversial." *Id.* at 35a. The court also regarded COPA's affirmative defenses as deficient because, while they furnish protection against conviction, they "do not provide the Web publishers with assurances of freedom from prosecution." *Id.* at 36a-37a.

For the reasons given by the district court, the court of appeals held that filtering software "may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material." App., *infra*, 47a. The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." *Id.* at 48a.

Relying on the same considerations that led it to conclude COPA is not narrowly tailored, the court of appeals held that COPA is substantially overbroad. App., *infra*, 49a-54a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." *Id.* at 58a. Relying on the same considerations that led it to conclude that COPA's definition of "minors" is not narrowly tailored, the court invalidated that definition as unconstitutionally vague. *Id.* at 55a n.37.

Finally, the court concluded that it had no authority to attempt to sever COPA's asserted invalid applications from its valid applications. App., *infra*, 59a. The court therefore affirmed the district court's preliminary injunction against any enforcement of COPA. *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

For the second time, the court of appeals has held that the Child Online Protection Act violates the First Amendment. The court's decision prevents the government from enforcing COPA against anyone under any

circumstances and leaves minors unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web. The court's decision is also incorrect. COPA is narrowly tailored to further the government's compelling interest in shielding minors from the harmful effects of pornography on the Web and is neither substantially overbroad nor vague. In concluding otherwise, the court of appeals misinterpreted key terms in COPA and misapplied established First Amendment principles. Review by this Court is therefore warranted.

I. THE COURT OF APPEALS HAS INVALIDATED AN ACT OF CONGRESS

The court of appeals has again invalidated the Act of Congress that was carefully crafted to further the compelling interest in protecting minors from the harmful effects of pornography on the Web. Relying on general and tentative district court findings at the preliminary injunction stage, the court of appeals held without qualification that COPA's harmful-to-minors standard, its commercial purposes limitation, and its affirmative defenses "are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test." App., *infra*, 19a. It held that "COPA does not employ the 'least restrictive means' to effect the Government's compelling interest in protecting minors." *Id.* at 38a. It held that "COPA is substantially overbroad." *Id.* at 49a. And it held that COPA's definition of minors is "impermissibly vague." *Id.* at 55a n.37.

Based on those holdings, the court enjoined the government from enforcing COPA in any respect, rendering that important Act of Congress a nullity and leaving minors without the protection against harmful online

pornography that Congress so carefully fashioned to correct the flaws this Court, in *Reno* v. *ACLU*, had identified in the Communications Decency Act. The court of appeals' invalidation of COPA once again clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

II. THE COURT OF APPEALS ERRED IN HOLDING COPA UNCONSTITUTIONAL

The court of appeals erred in invalidating COPA. COPA requires Web businesses that make profit-motivated harmful-to-minors communications as a regular course of their business to place such material behind age verification screens. 47 U.S.C. 231(a)(1) and (c)(1). COPA is modeled on state laws that require local stores to place pornographic material that is harmful to minors behind blinder racks, in sealed wrappers, or in opaque covers. Courts of appeals and state courts have consistently upheld those state display laws on the ground that they further the government's compelling interest in shielding minors from material that would impair their psychological and moral development, without imposing an unreasonable burden on adults who seek access to such material.[3] COPA is constitutional for the same reason. Indeed, COPA's princi-

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[3] *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983).

pal effect is merely to require commercial pornographers who already place much of their material behind age verification screens to place their pornographic "teasers" behind those screens as well.

The record in this case confirms that COPA is carefully tailored to avoid undue interference with valuable Web communications. Despite the numerous exhibits submitted by respondents and their amici in an effort to demonstrate that COPA has an unjustifiable scope, the court of appeals identified only three Web communications with serious value for adults that are even *arguably* covered by COPA. App., *infra*, 52a-54a & n.35. And, under the correct interpretation of COPA, those communications are plainly not covered by COPA. See pp. 28-29, *infra*.

The court of appeals nonetheless viewed COPA as having a series of fatal flaws. The court's objections are all without merit.

A. COPA Is Narrowly Tailored

1. The court of appeals held that COPA's harmful-to-minors definition is not narrowly tailored. App., *infra*, 20a-28a. But that harmful-to-minors definition narrowly confines COPA's application to material that, taken as a whole, is designed to appeal to the prurient interest of minors, is patently offensive with respect to minors, and, taken as a whole, lacks serious value for minors. 47 U.S.C. 231(e)(6). That definition substantially tracks the harmful-to-minors definition this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629, 646 (1968). It parallels the definition of harmful to minors in state display laws. *E.g. Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is analogous to the definition of obscenity that this

Court upheld in *Miller* v. *California*, 413 U.S. 15, 24 (1973).

a. The court of appeals found two flaws in COPA's harmful-to-minors definition. First, despite COPA's directive to examine material "as a whole," 47 U.S.C. 231(e)(6), the court of appeals concluded that COPA requires particular Web postings to be evaluated "in isolation, rather than in context." App., *infra*, 22a. That interpretation of COPA is incorrect.

The term "as a whole" has its source in this Court's obscenity decisions, and, in that setting, it carries with it the complementary requirement that material be judged in context, rather than in isolation. See *Roth* v. *United States*, 354 U.S. 476, 490 (1957) (approving jury instructions stating: "The test in each case is the effect of the book, picture or publication considered as a whole. * * * The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."); *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam) (under *Roth*'s "as a whole" requirement, a reviewing court "must, of necessity, look at the context of the material, as well as its content"). The "in context" aspect of the "as a whole" inquiry reinforces the basic inquiry that a particular depiction or passage *not* be considered in isolation. For example, under *Roth*, a book must be judged as a whole, while passages in the book must be judged in the context of the book. In using the term "as a whole" in COPA, Congress incorporated that settled understanding. As this Court has explained, terms borrowed from other sources bring with them the "cluster of ideas" attached to the term. *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992).

In concluding otherwise, the court of appeals relied (App., *infra*, 25a) on COPA's description of harmful material as "*any* communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." 47 U.S.C. 231(e)(6) (emphasis added). But considering a particular picture or communication "as a whole" is fully consistent with examining it in the context in which it is presented, rather than in isolation. Indeed, the harmful-to-minors laws on which COPA was modeled describe harmful material as "*any* description or representation" that is harmful to minors, *Ginsberg*, 390 U.S. at 646 (emphasis added); *American Booksellers*, 372 S.E. 2d at 621 (emphasis added), and one of the obscenity statutes examined in *Roth* referred to "*any* obscene or indecent writing, * * * picture or print," 354 U.S. at 479 n.2 (emphasis added). Just as particular pictures and descriptions were to be considered in context under those statutes, they are to be so considered under COPA.

At the very least, nothing in COPA precludes the Court from interpreting COPA to incorporate an "in context" requirement if that is necessary to sustain its constitutionality. The Court has not hesitated to interpret federal statutes to embody certain standards when necessary to preserve their constitutionality, even when the requirements were not set forth in statutory text. See *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974) (interpreting federal obscenity statute to incorporate *Miller*'s constitutional requirements, even though the statutory text did not incorporate those requirements); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (interpreting the federal child pornography statute's "knowing" requirement to apply to knowledge of the age of the performers and the sexually explicit nature of the material,

even though the knowledge requirement would not apply to those elements under a grammatical reading of the statute).

b. The court of appeals also condemned COPA's harmful-to-minors definition on the ground that Web publishers cannot know which minors should be considered in deciding whether material lacks "serious value" for minors. App., *infra*, 24a. That criticism is misguided. Material is not covered by COPA unless it lacks serious value for all protected age groups, including the oldest group. State display laws have repeatedly been interpreted to incorporate that older-minor standard. See *American Booksellers Ass'n*, 372 S.E.2d at 624 (material has serious value for minors if it has serious value for a "legitimate minority of older, normal adolescents"); *Davis-Kidd*, 866 S.W.2d at 533 (material has serious value for minors if it has serious value for "a reasonable seventeen year old minor"); *Webb*, 919 F.2d at 1504-1505 (same). Because Congress intended to use the "familiar" definition of "harmful to minors" as that standard had been applied in the context of state display laws "over the years," H.R. Rep. No. 775, *supra*, at 13 (citing cases), COPA should be construed to incorporate that interpretation of state display laws. *Evans*, 504 U.S. 259-260 & n.3. That construction is also supported by the principle that federal statutes should be interpreted to avoid constitutional questions, rather than to create them. *X-Citement Video, Inc.*, 513 U.S. at 78.

The court of appeals concluded that COPA cannot be construed to incorporate an older-minor standard because COPA defines minor as "any person under 17 years of age." 47 U.S.C. 231(e)(7). But the state display laws cited above all had similar definitions. *American Booksellers Ass'n*, 372 S.E.2d at 621; *Davis-Kidd*, 866

S.W.2d at 534; *Webb*, 919 F.2d at 1513. COPA's definition of minors therefore provides no basis for departing from the settled understanding that material lacks serious value "for minors" as a class only when it lacks serious value for all protected age groups, including the oldest protected group.

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny." App, *infra*, 27a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Not surprisingly, the court of appeals expressly refused to "suggest how Congress could have tailored its statute" in any other way. *Ibid.*[4]

2. The court of appeals similarly erred in holding that COPA's "commercial purposes" limitation is not narrowly tailored. As the court recognized, under that provision, a business is not covered by COPA unless it seeks to profit from harmful-to-minors material "as a regular course" of its business. 47 U.S.C. 231(e)(2)(A) and (B). The court viewed that limitation as insufficient because Web businesses are covered even when they do not post harmful material as a "principal part" of their business, and even when they seek to profit through sales of "advertising space" rather than the sale of harmful material itself. App., *infra*, 29a. Congress did not act unconstitutionally in failing to tailor COPA in the ways proposed by the court of appeals.

[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." App, *infra*, 55a-56a n.37. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

Had Congress limited COPA's scope to businesses that post harmful material as a principal part of their business, a significant loophole would have been created. Under that interpretation, Web businesses that expressly hold themselves out as purveyors of pornography and Web businesses that post a substantial amount of pornography on their Web sites would be exempt from the reach of the law, as long as harmful material was not the principal part of their business. COPA's commercial purposes definition closes that loophole and ensures that minors receive the protection they need. COPA's definition also avoids the enormous practical difficulty that would arise from any attempt to define and calculate whether a Web business has posted harmful material as a "principal part" of its business.

Congress's extension of COPA's obligations to businesses that seek to profit from harmful material by selling advertising space is also unproblematic. When such businesses post harmful material as a regular course of their business, they pose just as much of a threat to minors as businesses that post harmful material in order to sell it to consumers. And there is no evidence that businesses that post harmful material in order to sell advertising space are any less able to bear the costs of complying with COPA than businesses that seek to profit from selling harmful material directly.

3. The court of appeals further erred in holding that COPA's affirmative defenses are not narrowly tailored. COPA provides "an affirmative defense to prosecution" for businesses that restrict access by minors to harmful material by requiring use of a credit card or an adult ID. 47 U.S.C. 231(c)(1). That defense allows adults to obtain access to speech that they have a constitutional right to receive, while protecting minors from material that is harmful to them.

Relying on the district court's tentative and general findings, the court of appeals held that COPA's affirmative defenses are not narrowly tailored. The court of appeals reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." App., *infra*, 35a. The court of appeals' assertion that "COPA will likely deter many adults from accessing restricted content" does not precisely track the district court's findings. The district court found that respondents "are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose *some* adult users to the portions of the sites that are behind screens." *Id.* at 34a (emphasis added). That finding does not provide a sufficient factual basis for the court of appeals' holding that COPA's affirmative defenses are not narrowly tailored.

Requiring an adult to present an adult ID or a valid credit card number in order to obtain access to harmful material is not an unreasonable burden. The number of people who use adult IDs and credit cards on the Web demonstrates as much. At the time of trial, approximately three million people possessed a valid Adult Check ID, App., *infra*, 142a, and many commercial Web sites, such as Amazon.com, require a credit card to make a purchase, *id.* at 136a. Moreover, COPA also requires Web businesses that establish screening mechanisms to maintain the confidentiality of information collected in that process. 47 U.S.C. 231(d)(1). A violation of that requirement is punishable by a fine of up to $10,000 and imprisonment for up to one year. 47 U.S.C. 501.

The court of appeals was apparently of the view that Congress may further its compelling interest in protecting minors from harmful material only if it can do so without imposing *any* burden on adults that might deter some adults from seeking access to the material. That conception of the First Amendment conflicts with *Ginsberg's* holding that States may prohibit the sale of harmful material to minors. In order to enforce prohibitions on sale of harmful material to minors, local stores may ask some customers for a driver's license as proof of age.

The court of appeals' First Amendment theory also conflicts with the decisions upholding state display laws. See n.3, *supra*. Those laws impose some burden on adults who seek access to material that is harmful to minors. Some adults may steer clear of blinder racks for fear of public embarrassment; others may be disinclined to purchase magazines in sealed wrappers because they cannot peruse them first. And stores displaying harmful-to-minors material may pass on to their customers the costs of establishing and maintaining a system that prevents minors from obtaining access to such material.

The court of appeals' First Amendment theory also conflicts with this Court's recent decision in *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003). In that case, the Court upheld the constitutionality of the Children's Internet Protection Act (CIPA), 114 Stat. 2763A-335, which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscenity, child pornography, and material that is harmful to minors. The Court rejected the district court's conclusion that CIPA violates the First Amendment because it requires adults to ask library personnel to unblock

certain Web sites and adults may be too embarrassed to make such a request. A plurality of the Court stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." *Id.* at 2307. Justices Kennedy and Breyer similarly concluded that placing a burden on adults to request access to blocked sites does not violate the First Amendment. *Id.* at 2309 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment).

That analysis also has persuasive force here. In order to further its compelling interest in protecting minors from the harmful effects of pornography, Congress may impose conditions that result in a reasonable burden on adults who seek access to that material on the Web. Requiring adults seeking pornographic material to present a valid credit card or an adult ID (which maintains the user's anonymity to the Web site) is a reasonable burden in order to serve the compelling interest in protecting minors from pornography. The harmful-to-minors material covered by COPA is not constitutionally protected for minors, even though it may be for adults. Requiring a credit card or adult ID as a condition of access is a readily available and familiar mechanism for distinguishing the former from the latter.

Nor does it matter that a Web publisher's use of a screening device is an affirmative defense to prosecution, rather than an "assurance[] of freedom from prosecution." App., *infra*, 36a-37a. Only an irresponsible prosecutor would bring criminal charges when he knows that a person has a valid defense, and this Court presumes that federal prosecutors will "properly discharge[] their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States*

v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Moreover, persons who maintain Web sites are plainly in a position to know whether they have required credit cards or adult IDs as a gateway to the harmful material on their Web sites.

B. There Is No Alternative To COPA That Is Equally Effective

The court of appeals also erred in invalidating COPA on the ground that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material online." App., *infra*, 40a-41a. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective. COPA *compels* persons who display material on the Web to take steps to prevent minors from obtaining access to material that is harmful to them. Under the court of appeals' alternative, no entity is required to install filtering software. Blocking software also has several additional built-in limitations. It blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. App., *infra*, 148a, 160a. Minors with sufficient computer skills can defeat the blocking device. *Id.* at 148a. A minor's access is not restricted on a computer that lacks blocking software. *Ibid.* Software can be expensive for parents to purchase. H.R. Rep. No. 775, *supra*, at 19. And software must be updated periodically at an additional cost. *Id.* at 20.

Because of those deficiencies in blocking software, the court of appeals' reliance (*App., infra*, 42a-43a) on *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), was misplaced. There, the less restrictive alternative identified by the Court *required*

cable operators to block undesired channels upon the request of the subscriber, *at no cost* to the subscriber. 529 U.S. at 803-804. Moreover, once the operator blocked the channel, it would eliminate *entirely* the problem of signal bleed *without affecting content on other channels.* The court of appeals' alternative does not share any of those features. In addition, in *Playboy*, the Court viewed the alternative it identified as sufficient in large part because the government had failed to demonstrate that signal bleed was a serious or pervasive problem. 529 U.S. at 819-821. In contrast, Congress enacted COPA because it determined that pornography is widely available on the Web and that minors can easily obtain access to it. 47 U.S.C. 231 note (Finding 1).

As the district court found, COPA's screening requirement will not protect minors from all sources of harmful material. It does not apply to non-Web protocols on the Internet and non-commercial Web sites, and its application to foreign Web sites is problematic. App., *infra*, 39a. Congress reasonably concluded, however, that domestic commercial Web businesses display an enormous quantity of material that is harmful to minors. H.R. Rep. No. 775 , *supra*, at 7. Congress was entitled to address that serious problem caused by persons in this country, and to do so with the most effective means available. The district court also found that some minors may obtain access to credit cards and adult IDs, App., *infra*, 39a, but there is no evidence that a substantial number of minors possess such cards or that the ones who do are free to use them without adult supervision. Thus, while COPA's reliance on credit cards and adult IDs is not a perfect solution, it is far more effective with respect to domestic commercial Web sites than blocking software.

Congress also did not ignore the dangers posed by other sources of harmful material. As to those sources, it concluded that blocking software constitutes the most practical solution currently available. The reason is that non-Web protocols lack the technology for age screening; enforcement of a screening requirement against foreign Web sites would create serious enforcement difficulties; and *Reno* v. *ACLU*, 521 U.S. at 876-877, raised questions about the constitutionality of imposing compliance costs on non-commercial Web sites. In contrast, despite its limitations, blocking software can be used to address each of those sources of harmful material to some extent. For that reason, in a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software. 47 U.S.C. 230(d).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Rather, Congress envisioned that they would work together to prevent minors from being exposed to harmful material. COPA's screening requirement applies where it is far more effective, and blocking software is available to limit the sources of harmful material that COPA's screening requirement cannot. In these circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which consists of COPA's screening requirement *and* the notification of customers of the availability of blocking software—is significantly more effective in preventing access to harmful material than blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, the

court of appeals' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.

C. COPA Is Not Substantially Overbroad

The court of appeals further erred in holding that COPA is substantially overbroad. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored. The court's flawed narrow-tailoring analysis therefore infected its overbreadth analysis as well.

The court's flawed narrow-tailoring analysis also tainted the court's conclusion that COPA's reliance on community standards "exacerbates" COPA's substantial overbreadth. App., *infra*, 58a. Because the features of COPA on which the court relied in its narrow-tailoring analysis are not "constitutional problems" to begin with, *ibid*, COPA's reliance on community standards cannot exacerbate any such problems. And, as this Court held in *Ashcroft* v. *ACLU*, 535 U.S. at 585, "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."

The court's overbreadth analysis is flawed for another reason. For a law to be unconstitutionally overbroad, its impermissible applications must be "'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197 (2003). Here, the court of appeals failed to establish that COPA's impermissible applications are substantial in an absolute sense, much less that they are substantial relative to COPA's many plainly legitimate applications.

Indeed, while respondents and their amici offered an enormous number of exhibits in an effort to show that

COPA has a substantial number of invalid applications, the court identified only three specific problematic applications of COPA. App., *infra*, 52a-54a & n.35. Moreover, in each case, the court concluded only that COPA *arguably* covers the material at issue, and that conclusion depended on the court's view that COPA requires each communication to be viewed in isolation. *Ibid.* The court acknowledged that COPA would not cover the material at issue when viewed in the context in which it was presented. *Ibid.* As discussed above, material is to be considered in context, rather than isolation, under COPA. Accordingly, COPA does not cover *any* of the communications discussed by the court of appeals.

The court of appeals therefore held COPA substantially overbroad without identifying a single real life example of an invalid application. This Court's overbreadth decisions plainly do not support such a holding.

III. THE QUESTION PRESENTED IS RIPE FOR REVIEW

No further proceedings in the lower courts are needed to clarify the question presented or to render that question suitable for resolution by this Court. The court of appeals invalidated COPA based on a series of legal rulings regarding the scope of COPA and interpretations of First Amendment doctrine on narrow tailoring, less restrictive alternatives, substantial overbreadth, and vagueness. No further proceedings in the district court are needed for this Court to resolve those legal issues.

Moreover, the government has been subject for some time to a nationwide preliminary injunction that prevents it from enforcing COPA against anyone. Given the nature of the court of appeals' decision affirming

that preliminary injunction, and the denial of en banc review, there is every reason to expect that further proceedings in the district court would simply result in a permanent injunction of a similarly wide scope on the same grounds, and an affirmance of that injunction by the court of appeals. The result would be needlessly to delay this Court's resolution of the important questions presented concerning Congress's ability to protect minors from sexually explicit materials on the Web, and to exacerbate the adverse consequences of the decision below.

In *Ashcroft* v. *ACLU*, this Court granted certiorari to review the court of appeals' holding at the preiminary injunction stage that COPA's reliance on community standards likely violates the First Amendment. 535 U.S. at 573. For similar reasons, immediate review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2003

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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193-P

TABLE OF CONTENTS

	Page
Appendix A (opinion of the U.S. Court of Appeals for the Third Circuit (Filed: Mar. 6, 2003))	1a
Appendix B (opinion of the U.S. Court of Appeals for the Third Circuit (Filed: June 22, 2000))	67a
Appendix C (memorandum of the U.S. Dist. Ct. E.D. Pa. (Filed: Feb. 1, 1999))	106a
Appendix D (memorandum of the U.S. Dist. Ct. E.D. Pa. (Filed: Nov. 23, 1998))	167a
Appendix E (sur petition for panel rehearing and petition for rehearing en banc (May 13, 2003))	181a
Appendix F (Section 231 of Title 47 of the United States Code)	183a
Appendix G (Congressional Findings)	190a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE; ADDAZI INC. D/B/A CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; INTERNET CONTENT COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORE; RIOTGRRL; SALON INTERNET, INC.; WEST STOCK, INC.; PLANETOUT CORPORATION

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

Filed: March 6, 2003

Before: NYGAARD and MCKEE, Circuit Judges, and GARTH, Senior Circuit Judge.

OPINION OF THE COURT

GARTH, Circuit Judge.

This case comes before us on vacatur and remand from the Supreme Court's decision in *Ashcroft v. ACLU*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed.2d 771 (2002), in which the Court held that our decision affirming the District Court's grant of a preliminary injunction against the enforcement of the Child Online Protection Act ("COPA")[1] could not be sustained because "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 1713 (emphasis in original). Pursuant to the Supreme Court's instructions in *Ashcroft*, we have revisited the question of COPA's constitutionality in light of the concerns expressed by the Supreme Court.

Our present review of the District Court's decision and the analysis on which that decision was based does not change the result that we originally had reached, albeit on a ground neither decided nor discussed by the District Court. *See ACLU v. Reno*, 217 F.3d 162 (3d Cir.2000) (*"Reno III"*), *vacated and remanded*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed.2d 771 (2002). We had affirmed the District Court's judgment granting the plaintiffs a preliminary injunction against the enforcement of COPA because we had determined that COPA's reliance on "community standards" to identify material "harmful to minors" could not meet the exacting standards of the First Amendment. On remand

[1] We attach the text of COPA as Appendix A.

from the Supreme Court, with that Court's instruction to consider the other aspects of the District Court's analysis, we once again will affirm.

I.

COPA, Pub.L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231), is Congress's second attempt to regulate pornography on the Internet. The Supreme Court struck down Congress's first endeavor, the Communications Decency Act, ("CDA"), on First Amendment grounds. *See Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (*"Reno I"*). To place our COPA discussion in context, it is helpful to understand its predecessor, the CDA, and the opinion of the Supreme Court which held it to be unconstitutional.

A.

In *Reno I*, the Supreme Court analyzed the CDA, which prohibited *any* person from posting material on the *Internet* that would be considered either *indecent* or obscene. *See Reno I*, 521 U.S. at 859, 117 S. Ct. 2329. Like COPA, the CDA provided two affirmative defenses to prosecution: (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors. *See id.* at 860, 117 S.Ct. 2329.

The Court, in a 7-2 decision, and speaking through Justice Stevens, held that the CDA violated many different facets of the First Amendment. The Court held that the use of the term "indecent," without definition, to describe prohibited content was too vague

to withstand constitutional scrutiny.[2] Justice Stevens further determined that "[u]nlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. . . . [Rather, i]ts open- ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers." *Id.* at 877, 117 S. Ct. 2329.[3]

In holding that "the breadth of the CDA's coverage is wholly unprecedented," the Court continued by noting that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78, 117 S. Ct. 2329.

The Court also discussed the constitutional propriety of the credit card/age verification defenses authorized by the CDA. Utilizing the District Court's findings, the Court held that such defenses would not be feasible for

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[2] In particular, the Court cited to discussions of society's concerns regarding prison rape and homosexuality—matters that would have redeeming value, but were nonetheless prohibited by the statute. *See id.* at 871, 117 S. Ct. 2329; *see also id.* at 877, 117 S.Ct. 2329 ("The general, undefined terms . . . cover large amounts of non-pornographic material with serious educational or other value.").

[3] Justice Stevens was referring to the Supreme Court's decisions in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), which upheld against a First Amendment challenge a statute prohibiting the sale to minors of materials deemed harmful to them (in that case, "girlie" magazines), *id.* at 634, 88 S.Ct. 1274; and *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed.2d 1073 (1978), which upheld under the First Amendment the FCC's authority to regulate certain broadcasts it deemed indecent.

most noncommercial Web publishers, and that even with respect to commercial publishers, the technology had yet to be proven effective in shielding minors from harmful material. *See id.* at 881, 117 S. Ct. 2329. As a result, the Court determined that the CDA was not narrowly tailored to the Government's purported interest, and "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874, 117 S. Ct. 2329.

B.

COPA, by contrast, represents an attempt by Congress, having been informed by the concerns expressed by the Supreme Court in *Reno I*, to cure the problems identified by the Court when it had invalidated the CDA. Thus, COPA is somewhat narrower in scope than the CDA. COPA provides for civil and criminal penalties for an individual who, or entity that,

> knowingly and with *knowledge* of the character of the material, in interstate or foreign commerce by means of the *World Wide Web*, makes any communication *for commercial purposes* that is available to any minor and that includes any *material that is harmful to minors.*

47 U.S.C. § 231(a)(1) (emphasis added).

Unfortunately, the recited standard for liability in COPA still contains a number of provisions that are constitutionally infirm. True, COPA, in an effort to circumvent the fate of the CDA, expressly defines most of these key terms. For instance, the phrase "by means of the World Wide Web" is defined as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hyper-

text transfer protocol or any successor protocol." *Id.* § 231(e)(1).[4] As a result, and as is detailed below, COPA does not target *all* of the other methods of online communication, such as e-mail, newsgroups, etc. that make up what is colloquially known as the "Internet." *See ACLU v. Reno*, 31 F. Supp.2d 473, 482-83 (Finding of Fact ¶ 7) (E.D.Pa.1999) ("*Reno II*").

1.

Further, only "commercial" publishers of content on the World Wide Web can be found liable under COPA. The statute defines "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, a person is "engaged in the business" under COPA if that person

> who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the

[4] HTTP, or HyperText Transfer Protocol, has been described as follows: "Invisible to the user, HTTP is the actual protocol used by the Web Server and the Client Browser to communicate over the 'wire.' In short, [it is] the protocol used for moving documents around the Internet." NEWTON'S TELECOM DICTIONARY 335 (17th ed.2001).

Essential concepts that are part of HTTP include (as its name implies) the idea that files can contain references to other files whose selection will elicit additional transfer requests.

> person's sole or principal business or source of income).

Id. § 231(e)(2)(B) (emphasis added). Individuals or entities therefore can be found liable under COPA if they seek to make a profit from publishing material on the World Wide Web—thus, individuals who place such material on the World Wide Web *solely* as a hobby, or for fun, or for other than commercial profiteering are not in danger of either criminal or civil liability.

2.

Furthermore, and of greater importance, is the manner in which the statute defines the content of prohibited material; that is, what type of material is considered "harmful to minors." The House Committee Report that accompanied COPA explains that the statute's definition of the "harmful to minors" test constitutes an attempt to fuse the standards upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), and *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).[5] *See* H.R. REP. No. 105-775, at 12-13 (1998).

[5] As stated earlier, *see* note 3, *supra*, *Ginsberg* upheld a New York statute prohibiting the sale to persons under seventeen years of age of material deemed to be obscene to minors, noting that "the concept of obscenity . . . may vary according to the group to whom the questionable material is directed." *Ginsberg*, 390 U.S. at 636, 88 S. Ct. 1274 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668, 671 (1966)). Five years later, the Supreme Court announced its decision in *Miller*, which advanced the familiar three-part test for determining obscenity:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work

In particular, whether material published on the World Wide Web is "harmful to minors" is governed by a three-part test, *each* prong of which must be satisfied before one can be found liable under COPA:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).[6]

This definition follows a formulation similar to that which the Supreme Court articulated in *Miller*. Importantly, however, whereas *Miller* applied such standards

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depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24, 93 S. Ct. 2607 (internal citations and quotation omitted).

[6] The statute also provides that material is "harmful to minors" if it is "obscene." 47 U.S.C. § 231(e)(6). That part of the definition of material harmful to minors is not at issue here.

as related to the average adult, the "harmful to minors" test applies them with respect to minors. [7]

COPA, as earlier noted, also provides a putative defendant with affirmative defenses. If an individual or entity "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number ... a digital certificate that verifies age . . . or by any other reasonable measures that are feasible under available technology," the individual will not be liable if a minor should access this restricted material. *Id.* § 231(c)(1). The defense also applies if an individual or entity attempts "in good faith to implement a defense" listed above. *Id.* § 231(c)(2).

C.

On October 22, 1998, the day after President Clinton signed COPA into law, the American Civil Liberties Union, as well as a number of individuals and entities that publish information on the World Wide Web (collectively, the "plaintiffs" or "ACLU"), brought an action in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of the Act. After five days of testimony, the District Court rendered sixty-eight separate findings of fact concerning the Internet and COPA's impact on speech activity. *See Reno II*, 31 F. Supp.2d at 481-92 (Findings of Fact ¶¶ 0-67). These findings were detailed in our original opinion. *See Reno III*, 217 F.3d at 168-69. We recite only those relevant findings in this opinion when we discuss and analyze the constitutionality of COPA. These findings bind us in this appeal

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[7] Under COPA, a minor is defined as one under age seventeen. *See* 47 U.S.C. § 231(e)(7).

unless found to be clearly erroneous. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 406, 121 S. Ct. 1567, 149 L. Ed 2d 608 (2001). None of the parties dispute the accuracy of the findings, and as we recited in *Reno III*, 217 F.3d at 170, "none of the parties dispute the District Court's findings (including those describing the Internet and Web), nor are any challenged as clearly erroneous."

The District Court granted the plaintiffs' motion for a preliminary injunction against the enforcement of COPA on the grounds that COPA is likely to be found unconstitutional on its face for violating the First Amendment rights of adults. *Reno II*, 31 F. Supp.2d at 495.[8] In so doing, the District Court applied the familiar four-part test in connection with the issuance of a preliminary injunction. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999) (explaining that a preliminary injunction is appropriate where the movant can show (1) a likelihood of success on the merits; (2) irreparable harm without the injunction; (3) a balance of harms in the movant's favor; and (4) the injunction is in the public interest).

In evaluating the likelihood of the plaintiffs' success, the District Court first determined that COPA, as a content-based restriction on protected speech (in this case, nonobscene sexual expression), violated the strict scrutiny test. More specifically, it found that although COPA addressed a compelling governmental interest in

[8] The plaintiffs, however, did not limit their argument before the District Court to the facial invalidity of COPA with regard to adults. They also argued that COPA was facially invalid for violating the First Amendment rights of minors, and that COPA was unconstitutionally vague in violation of the First and Fifth Amendments. *See Reno II*, 31 F.Supp.2d at 478-79.

protecting minors from harmful material online, it was not narrowly tailored to serve that interest, nor did it provide the least restrictive means of advancing that interest. *See Reno II*, 31 F. Supp.2d at 493 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989)).

The District Court then addressed the remaining prongs of the preliminary injunction standard, concluding that a failure to enjoin enforcement of COPA would result in irreparable harm, that the balance of harms favored the plaintiffs because the Government does not have "an interest in the enforcement of an unconstitutional law," and that the public interest was "not served by the enforcement of an unconstitutional law. Indeed, [held the District Court,] . . . the interest of the public is served by preservation of the status quo until such time that this Court may ultimately rule on the merits of plaintiffs' claims at trial." *Reno II*, 31 F. Supp.2d at 498.

As a result, the District Court held that the plaintiffs had satisfied the requirements for a preliminary injunction which enjoined the enforcement of COPA.

D.

We affirmed the District Court's holding, but on different grounds.[9] *See Reno III*. We held that the reference to "community standards" in the definition of "material that is harmful to minors" resulted in an overbroad statute. Because the Internet cannot, through modern technology, be restricted geographically, we

[9] In so doing, however, we also addressed the four preliminary injunction factors and held that the plaintiffs had met their burden as to each of the four factors. *See Reno III*, 217 F.3d at 180-81.

held that the "community standards" language subjected Internet providers in even the most tolerant communities to the decency standards of the most puritanical.

As a result, we held that even if we were to assign a narrow meaning to the language of the statute or even if we would sever or delete a portion of the statute that is unconstitutional, we could not remedy the overbreadth problems created by the community standards language. Hence, we affirmed the District Court's preliminary injunction. *See id.* at 179-81.

E.

The Supreme Court vacated our judgment and remanded the case for further proceedings. The majority opinion, consisting of Parts I, II, and IV of the principal opinion authored by Justice Thomas, was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Breyer. It addressed the "narrow question whether the Child Online Protection Act's . . . use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment." *Ashcroft*, 122 S. Ct. at 1703.

After reviewing its decision in *Reno I* and the two prior decisions in this case, the Supreme Court referred to the "contemporary community standards" language from *Miller*, as representative of the primary concern in evaluating restrictions on speech: "to be certain that . . . [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person-or indeed a totally insensitive one." *Miller*, 413 U.S. at 33, 93 S. Ct. 2607.

As a result, the Court merely held "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft*, 122 S. Ct. at 1713 (emphasis in original). The Court was careful, however, not to "express any view as to whether . . . the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below." *Id.* The Court did not vacate the District Court's preliminary injunction. *Id.* at 1713-14.

In addition to the limited Opinion of the Court, the *Ashcroft* Court issued a number of other opinions authored and joined by other Justices, each of which is instructive to us on remand.

For example, Part III-B of Justice Thomas' opinion was joined only by Chief Justice Rehnquist and Justices O'Connor and Scalia. That portion of Justice Thomas' opinion explained that we relied too heavily on the *Reno I* Court's criticism that "the 'community standards' criterion [in the CDA] as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message," *Ashcroft*, 122 S. Ct. at 1709 (opinion of Thomas, J.) (quoting *Reno I*, 521 U.S. at 877-78, 117 S. Ct. 2329), particularly in light of the fact that COPA was drafted to cover a smaller category of communication than the CDA—namely, communication that appeals to the prurient interest and lacks "serious literary, artistic, political or scientific value to minors." 47 U.S.C. § 231(e)(6)(C).

Moreover, Parts III-A, III-C, and III-D of Justice Thomas' opinion were joined only by Chief Justice Rehnquist and Justice Scalia. Those Parts explained that the consideration of community standards was not invalid simply because providers of material on the Internet are unable to limit the availability of their speech on a geographic basis. He instead pointed out that jurors in different communities are likely to apply their own sensibilities to any consideration of community standards, even national ones. Justice Thomas then concluded that no meaningful distinction existed between the instant case and prior Supreme Court decisions upholding the use of a community standards test with respect to speech transmitted by phone or mail, *see Sable* (phone); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed.2d 590 (1974) (mail), stating that speakers bear the burden of determining their audience, and that those who find themselves disadvantaged by the fact that Internet communications cannot be limited geographically can simply choose a different, more controllable, medium for their communication. *See Ashcroft*, 122 S. Ct. at 1711-12 (opinion of Thomas, J.).

Justice O'Connor filed an opinion concurring in part and in the judgment. Although she agreed that COPA is not overbroad solely because of its reliance on community standards, she acknowledged the possibility that "the use of local community standards will cause problems for regulation of obscenity on the Internet ... in future cases." *Id.* at 1714 (O'Connor, J., concurring). She also disagreed with Justice Thomas' argument in Parts III-C and III-D that the Internet may be treated the same as telephone or mail communications: "[G]iven Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask." *Id.* As a result, Justice O'Connor advocated the adoption of a national standard for regulating Internet obscenity. She noted that Supreme Court precedents do not forbid such a result, and argued that such a standard would be no more difficult or unrealistic to implement than the standard created for the entire state of California in *Miller*. *Id.* at 1715.

Justice Breyer filed an opinion concurring in part and in the judgment in which he argued that "Congress intended the statutory word 'community' to refer to the Nation's adult community taken as a whole." *Id.* (Breyer, J., concurring). This standard would serve the purpose, argued Justice Breyer, of avoiding the difficult question of constitutionality under the First Amendment while experiencing no more "regional variation" than is "inherent in a system that draws jurors from a local geographic area." *Id.* at 1716.

Justice Kennedy filed an opinion concurring in the judgment, in which he was joined by Justices Souter and Ginsburg. Although Justice Kennedy agreed with us that a community standards factor when applied to the Internet is a greater burden on speech than when applied to the mails or to telephones, he did not agree that the extent of that burden could be ascertained without analyzing the scope of COPA's other provisions. *See id.* at 1719-20 (Kennedy, J., concurring). More specifically, Justice Kennedy felt that we should consider the effect of the provisions limiting COPA's scope to speech used for commercial purposes and to speech that is harmful to minors when taken "as a whole." *See id.* at 1720-21. Only after these provisions

are analyzed, argued Justice Kennedy, can the true effect of varying community standards be evaluated, and the question of overbreadth be properly addressed.

Finally, Justice Stevens authored a dissenting opinion, in which he reiterated our concerns expressed in *Reno III* that COPA's community standards factor was itself sufficient to render the statute constitutionally overbroad because communication on the Internet (unlike that through the mails or telephones) may not be restricted geographically. This fact, Justice Stevens claimed, was sufficient to invalidate COPA, particularly in light of the fact that many of the "limiting provisions" (i.e., the prurient interest, the patently offensive and the serious value prongs of the statute) mentioned by Justices Thomas and Kennedy apply only to minors, thereby burdening protected material which should be available to adults. *See id.* at 1726-27 (Stevens, J., dissenting).

Accordingly, on remand, we must again review the District Court's grant of a preliminary injunction in favor of the plaintiffs. This time, however, we must do so in light of the Supreme Court's mandate that the community standards language is not *by itself* a sufficient ground for holding COPA constitutionally overbroad. This direction requires an independent analysis of the issues addressed by the District Court in its original opinion. To assist us in this task, we asked the parties for additional submissions addressed to the opinion of the Supreme Court and to authorities filed subsequent to that opinion and since we last addressed COPA in *Reno III*.

II.

As mentioned above, in order to grant a motion for a preliminary injunction, a district court must address the following four factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, 171 F.3d at 158 (citing *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc)). We review the District Court's grant of a preliminary injunction in favor of the ACLU to determine "whether the court abused its discretion, committed an obvious error in applying the law, or made a clear mistake in considering the proof." *In re Assets of Martin*, 1 F.3d 1351, 1357 (3d Cir.1993) (citing *Philadelphia Marine Trade Ass'n v. Local 1291*, 909 F.2d 754, 756 (3d Cir.1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed.2d 1041 (1991)). [10]

The most significant and, indeed, the dispositive prong of the preliminary injunction analysis in the instant appeal is whether the plaintiffs bore their burden of establishing that they had a reasonable pro-

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[10] We have jurisdiction pursuant to the Supreme Court's order remanding the case to us for further proceedings. *See Ashcroft*, 122 S.Ct. at 1714. The plaintiffs have standing to sue because they could all reasonably fear prosecution under COPA, as their Web sites contained material that could be considered harmful to minors under the statute. *Reno III*, 217 F.3d at 171 (citing *Reno II*, 31 F.Supp.2d at 479).

bability of succeeding on the merits—that is, whether COPA runs afoul of the First Amendment to the United States Constitution. [11]

We hold that the District Court did not abuse its discretion in granting the preliminary injunction, nor did it err in ruling that the plaintiffs had a probability of prevailing on the merits of their claim inasmuch as COPA cannot survive strict scrutiny. By sustaining that holding, as we do, we would not then be obliged to answer the question of whether COPA is overly broad or vague. However, in order to "touch all bases" on this remand, we will nevertheless address the overbreadth doctrine with respect to COPA and the related doctrine of vagueness. *See infra* Part II.B. [12] In doing so, we hold that COPA is similarly deficient in that aspect as well.

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[11] In addition to being the only portion of the preliminary injunction standard addressed by the Supreme Court in its majority opinion or by the parties in their briefs before this Court, the probability of success prong is the only one about which any real debate exists.

In our earlier opinion in this case, we made clear that "Web publishers would most assuredly suffer irreparable harm" under COPA, that preliminary injunctive relief will not result in greater harm to the Government, as "COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction," and that preliminary injunctive relief is in the public interest because " 'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.' " *Reno III*, 217 F.3d at 180-81 (citation omitted).

[12] We note that much of our overbreadth analysis overlaps with much of the strict scrutiny analysis we discuss below.

A. Strict Scrutiny

We turn first, however, to the question of whether COPA may withstand strict scrutiny. Strict scrutiny requires that a statute (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest. *Sable*, 492 U.S. at 126, 109 S. Ct. 2829.

1. Compelling Interest

The Supreme Court has held that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Id.* (citing *Ginsberg*, 390 U.S. at 639-40, 88 S.Ct. 1274). The parties agree that the Government's stated interest in protecting minors from harmful material online is compelling. This being so, we proceed to the next question of whether COPA is narrowly tailored to meet that interest.

2. Narrowly Tailored

We hold that the following provisions of COPA are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test: (a) the definition of "material that is harmful to minors," which includes the concept of taking *"as a whole"* material designed to appeal to the "prurient interest" of minors; and material which (when judged as a whole) lacks "serious literary" or other "value" *for minors;* (b) the definition of "commercial purposes," which limits the reach of the statute to persons *"engaged in the business"* (broadly defined) of making communications of material that is harmful to minors; and (c) the *"affirmative defenses"* available to publishers, which

require the technological screening of users for the purpose of age verification.

(a) "Material Harmful to Minors"

We address first the provision defining "material harmful to minors."[13] Because COPA's definition of harmful material is explicitly focused on minors, it automatically impacts non-obscene, sexually suggestive speech that is otherwise protected for adults.[14] The remaining constitutional question, then, is whether the definition's subsets of "prurient interest" and lacking "serious . . . value for minors" are sufficiently narrowly tailored to satisfy strict scrutiny in light of the statute's stated purpose. We address each of these subsets.

COPA limits its targeted material to that which is designed to appeal to the "prurient interest" of minors. It leaves that judgment, however, to "the average person, applying contemporary community standards" and "taking the material as a whole."

As discussed in our initial opinion on the matter, when contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical

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[13] We note that the text of the statute reads "material *that is* harmful to minors." 47 U.S.C. § 231(e)(6) (emphasis added). For purposes of brevity, we often refer to this phrase as "material harmful to minors."

[14] Obscene materials are not protected under the First Amendment. *See, e.g., Ashcroft*, 122 S. Ct. at 1704 ("[O]bscene speech enjoys no First Amendment protection.").

communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings. *See Reno III*, 217 F.3d at 173-80.

This burden becomes even more troublesome when those evaluating questionable material consider it "as a whole" in judging its appeal to minors' prurient interests. As Justice Kennedy suggested in his concurring opinion, it is "essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else." *Ashcroft*, 122 S. Ct. at 1721 (internal citation omitted). We agree with Justice Kennedy's suggestion, and consider this issue here.

While COPA does not define what is intended to be judge "as a whole," the plain language of COPA's "harmful material" definition describes such material as "*any* communication, picture, image file, article, recording, writing, or other matter of any kind" that satisfies the three prongs of the "material harmful to minors" test: prurient interest, patently offensive, and serious value. 47 U.S.C. § 231(e)(6) (emphasis added). In light of the particularity and specificity of Congress's language, Congress had to mean that each individual communication, picture, image, exhibit, etc. be deemed "a whole" by itself in determining whether it appeals to the prurient interests of minors, because that is the unmistakable manner in which the statute is drawn.

The taken "as a whole" language is crucial because the First Amendment requires the consideration of context. As Justice Kennedy observed in his concurring opinion in *Ashcroft*, the application of the constitutional taken "as a whole" requirement is complicated in the Internet context: "It is unclear whether

what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Ashcroft*, 122 S. Ct. at 1717. As the Supreme Court has recently noted:

> [It is] an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene. . . . Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 1401, 152 L. Ed.2d 403 (2002) (citation omitted).

Yet, here the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation, rather than in context. As such, COPA's taken "as a whole" definition surely fails to meet the strictures of the First Amendment.

By limiting the material to individual expressions, rather than to an expanded context, we would be hard-pressed to hold that COPA was narrowly tailored to achieve its designed purpose. For example, one sexual image, which COPA may proscribe as harmful material, might not be deemed to appeal to the prurient interest of minors if it were to be viewed in the context of an entire collection of Renaissance artwork. However, evaluating just that one image or picture or writing by itself rules out a context which may have alleviated its prurient appeal. As a result, individual communications

that may be a integral part of an entirely non-prurient presentation may be held to violate COPA, despite the fact that a completely different result would obtain if the entire context in which the picture or communication was evaluated "as a whole."

Because we view such a statute, construed as its own text unquestionably requires, as pertaining only to single individual exhibits, COPA endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted under COPA, i.e., material that is obscene as to minors. *See Ginsberg*, 390 U.S. at 639-43, 88 S. Ct. 1274. Accordingly, while COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults. Thus, in our opinion, the Act, which proscribes publication of material harmful to minors, is not narrowly tailored to serve the Government's stated purpose in protecting minors from such material.

Lastly, COPA's definition of "material that is harmful to minors" only permits regulation of speech that when "taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*." 47 U.S.C. § 231(e)(6)(C) (emphasis added). COPA defines the term minor as "any person under 17 [seventeen] years of age." *Id.* § 231(e)(7).[15] The statute does not limit the

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[15] The term "minor" appears in both the "prurient interest" and "patently offensive" prongs of COPA's "material that is harmful to minors" definition. *See* statutory text *supra* Part I.B.2. The problems with the definition of minor which we identify in this section are applicable to both these two prongs. As such, these prongs are also constitutionally infirm on that ground.

term minor in any way, and indeed, in its briefing, the Government, in complete disregard of the text, contends that minor means a "normal, older adolescent." Orig. Gov't Br. at 32; Gov't Br. on Remand at 27-28; Gov't Reply Br. on Remand at 4-5.

We need not suggest how the statute's targeted population could be more narrowly defined, because even the Government does not argue, as it could not, that materials that have "serious literary, artistic, political or scientific value" for a sixteen-year-old would have the same value for a minor who is three years old. Nor does any party argue, despite Congress's having targeted and included *all* minors seventeen or under, that *pre-adolescent minors* (i.e., ages two, three, four, etc.) could be patently offended by a "normal or perverted sexual act" or have their "prurient interest" aroused by a "post-pubescent female breast," or by being exposed to whatever other material may be designed to appeal to prurient interests.

The term "minor," as Congress has drafted it, thus applies in a literal sense to an infant, a five- year old, or a person just shy of age seventeen. In abiding by this definition, Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these "minors" should be considered in deciding the particular content of their Internet postings. Instead, they must guess at which minor should be considered in determining whether the content of their Web site has "serious . . . value for [those] minors." 47 U.S.C. § 231(e)(6)(C). Likewise, if they try to comply with COPA's "harmful to minors" definition, they must guess at the potential audience of minors and their ages so that the publishers can refrain from posting material that will trigger the prurient interest, or be patently

offensive with respect to those minors who may be deemed to have such interests.

The Government has argued that "minors" should be read to apply only to normal, older adolescents. We realize as a pragmatic matter that some *pre-* adolescent minors may, by definition, be incapable of possessing a prurient interest. It is not clear, however, that the Government's proffered definition meets Congress's intended meaning for the term "minor" with respect to the "patently offensive" and "serious value" prongs. Furthermore, Congress has identified as objects of its concern children who cannot be described as "older" adolescents:

> Moreover, because of sophisticated, yet easy to use navigating software, minors who can read and type are capable of conducting Web searches as easily as operating a television remote. While a *four-year old may not be as capable as a thirteen year old,* given the right tools (e.g., a child trackball and browser software) each has the ability to 'surf' the Net and will likely be exposed to harmful material.

H.R. REP. No. 105-775, at 9-10 (emphasis added). Moreover, the statute, if meant to pertain only to normal, older adolescents (as the Government claims it does), does not by its own definition restrict its application to older adolescents, although we assume that Congress could have defined that universe in that manner.

Because the plain meaning of the statute's text is evident, we decline to rewrite Congress's definition of "minor."[16] We would note, however, that even if we

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[16] The Government has cited cases from two other Circuits in support of its proffered narrowing construction of "minor." We do

not find these analyses helpful. In *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir.1990), *cert. denied*, 500 U.S. 942, 111 S. Ct. 2237, 114 L. Ed.2d 479 (1991), the Eleventh Circuit upheld a Georgia law restricting the display of material "harmful to minors" in light of the fact that the use of blinder racks would satisfy the statute's requirement. *Id.* at 1508-09. In analyzing the "harmful to minors" test contained in that statute, the Eleventh Circuit interpreted the Supreme Court's opinion in *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L.Ed.2d 439 (1987), to "teach[ ] that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'" *American Booksellers*, 919 F.2d at 1504- 05.

We do not think that *Pope* leads to the conclusions that the Eleventh Circuit drew. In *Pope*, the Court explained that, under the "serious value" prong of the *Miller* test for obscenity, "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a *reasonable person* would find such value in the material, taken as a whole." *Pope*, 481 U.S. at 500-01, 107 S. Ct. 1918 (emphasis added). It does seem logical that if *Pope* requires a reasonable person standard for the "serious value" prong of the *Miller* test, then an analogous "serious value for minors" prong of a "harmful to minors" test would look to the value for a "reasonable minor." It does not follow, however, that the "reasonable minor" must be judged by reference to minors at the upper end of the spectrum of ages encompassed in the term "minor," unless the statute is drawn in that particular manner. We are not persuaded that COPA can be read and enforced that way.

The Fourth Circuit's opinion in *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir.1989), *cert. denied*, 494 U.S. 1056, 110 S. Ct. 1525, 108 L.Ed.2d 764 (1990), is likewise inapplicable. That case dealt with the interpretation of a Virginia statute prohibiting the display of sexually explicit materials to "juveniles [less than eighteen years of age]." *Id.* at 127 (citing Va.Code § 18.2-390(6)(c) (1982 & Supp. 1987)). The Fourth Circuit adopted the Virginia Supreme Court's interpretation of the state statute: "The Virginia Court then concluded that the ["serious value"] standard [of the Virginia statute] should be applied as it affects a 'legitimate minority of normal, older adolescents.'" *Id.* (citing *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618, 624 (1988)). Of course, the Virginia Supreme Court's interpretation of the state statute (a question that had been certified to the Virginia Court by the Supreme Court, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988)), is not binding on our interpretation of COPA. Hence, there is no reason to adopt or be persuaded by the statutory construction of the Virginia Supreme Court in our construction of COPA.

The Fourth Circuit has recently certified to the Virginia Supreme Court two questions relating to the scope of a 1999 amendment to the Virginia statute at issue in *American Booksellers Ass'n v. Virginia*. *See PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir.2003) (citing Va.Code § 18.2- 391, 1999 Va. Act ch. 936). Subsequent to oral argument, the Government submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) calling to our attention this order pertaining to the constitutionality of the 1999 amendment, which extends the regulation of sexually explicit material deemed "harmful to juveniles" to the Internet context. For the reasons we have identified, the Fourth Circuit's certification order has no bearing on our interpretation of COPA.

accepted the Government's argument, the term "minors" would not be tailored narrowly enough to satisfy strict scrutiny.

Regardless of what the lower end of the range of relevant minors is, Web publishers would face great uncertainty in deciding what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability. Even if the statutory meaning of "minor" were limited to minors between the ages of thirteen and seventeen, Web publishers would still face too much uncertitude as to the nature of material that COPA proscribes.

We do not suggest how Congress could have tailored its statute—that is not our function. We do no more than conclude that the use of the term "minors" in all

three prongs of the statute's definition of "material harmful to minors" is not narrowly drawn to achieve the statute's purpose—it is not defended by the Government in the exact terms of the statute, and does not lend itself to a commonsense meaning when consideration is given to the fact that minors range in age from infants to seventeen years. Therefore, even if we were to accept the narrowing construction that the Government proposes—and we do not—COPA's definition of the term "minor," viewed in conjunction with the "material harmful to minors" test, is not tailored narrowly enough to satisfy the First Amendment's requirements.

(b) "Commercial Purposes"

COPA's purported limitation of liability to persons making communications "for commercial purposes" does not narrow the reach of COPA sufficiently. Instead, COPA's definitions subject too wide a range of Web publishers to potential liability. As the District Court observed, "There is nothing in the text of COPA . . . that limits its applicability to so-called commercial pornographers only." *Reno II*, 31 F. Supp.2d at 480. Indeed, as we read COPA, it extends to any Web publisher who makes any communication "for commercial purposes." 47 U.S.C. § 231(a)(1).

The statute includes within "commercial purposes" any Web publisher who meets COPA's broad definition of being "engaged in the business" of making such communications. *Id.* § 231(e)(2)(A). The definition of "engaged in the business" applies to any person whose communication "includes *any material* that is harmful to minors" and who "devotes time . . . to such activities, as a *regular* course of such person's trade or

business, with the objective of earning a profit," if that person "knowingly causes [or solicits] the material that is harmful to minors to be posted on the World Wide Web." *Id.* § 231(e)(2)(B) (emphasis added).

Based on this broad definition of "engaged in the business," we read COPA to apply to Web publishers who have posted *any* material that is "harmful to minors" on their Web sites, even if they do not make a profit from such material itself or do not post such material as the principal part of their business. Under the plain language of COPA, a Web publisher will be subjected to liability if even a small part of his or her Web site displays material "harmful to minors."[17]

Moreover, the definition of "commercial purposes" further expands COPA's reach beyond those enterprises that sell services or goods to consumers, including those persons who sell advertising space on their otherwise noncommercial Web sites. *See Reno II*, 31 F. Supp.2d at 487 (Finding of Fact ¶ 33). Thus, the "engaged in the business" definition would encompass both the commercial pornographer who profits from his or her online traffic, as well as the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the Web site.[18] *See also Ashcroft*, 122 S.

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[17] As we have explained earlier, *see* Part II.A.2(a), *supra*, COPA's definition of material refers to *any single* "communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." 47 U.S.C. § 231(e)(6).

[18] We do not here confront the question of statutory interpretation whether the term "profit," in the context of COPA's definition of "engaged in the business," includes only those Web publishers seeking to earn economic profits or also includes nonprofit organizations or charities that seek to obtain revenue or

Ct. at 1721 (Kennedy, J., concurring) ("Indeed, the plain text of the Act does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result."). The latter model is a common phenomenon on the Internet. *See Reno II*, 31 F. Supp.2d at 484 (Findings of Fact ¶¶ 23, 30). This expansive definition of "engaged in the business" therefore includes a large number of Web publishers. Indeed, the District Court in its findings of fact cited to testimony that approximately one-third of the 3.5 million global Web sites (existing at that time) are "commercial," or "intend[ed] to make a profit." *Id.* at 486 (Finding of Fact ¶ 27).

Contrary to our reading and understanding of COPA, the Government contends that COPA's definition of "engaged in the business" limits liability to those persons who publish material that is harmful to minors "as a regular course of such person's business or trade," 47 U.S.C. § 231(e)(2)(B), claiming that this qualification limits the coverage of COPA. Based on this language, the Government argues that "COPA by its terms

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contributions—though not economic profits—from their Web sites. As one amicus brief notes, Congress did not exempt non-profit organizations as designated under the Internal Revenue Code. *See* Br. of Amici Curiae American Society of Journalists and Authors et al. at 6-7. If the term "profit," (and therefore the term "engaged in the business") includes Web publishers that are non-profit organizations, the scope of persons covered by COPA would be greatly expanded. Because of the large number of commercial entities that maintain Web sites (as found by the District Court), the scope of COPA, regardless of whether it covers non-profits, is in any event far broader than the core of commercial pornographers and the like that the Government has argued that COPA is intended to target.

covers only those 'harmful to minors' communications that are made by a person as a normal part of his or her for-profit business." Gov't Br. on Remand at 36 (internal quotation marks added). Indeed, the Government contends that COPA "covers only those communications that have a *substantial connection* to the *regular online marketing* of material that is harmful to minors." *Id.* at 36-37 (emphasis added).

We do not find the Government's argument persuasive. COPA's use of the phrase "regular course" does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes such material. Thus, even if posted material that is harmful to minors constitutes only a very small, or even infinitesimal, part of a publisher's entire Web site, the publisher may still be subject to liability. For example, if a Web site whose content deals primarily with medical information, but also "regularly" publishes a bi-weekly column devoted to sexual matters which could be deemed "harmful to minors," the publisher might well be subject to criminal liability under COPA. Although such a Web site primarily publishes medical information that is not "harmful to minors," the bi-weekly column, according to the Government's reading of COPA, would be a publication in "regular course."

In sum, while the "commercial purposes" limitation makes the reach of COPA less broad than its predecessor, inasmuch as the Communications Decency Act (CDA) was not limited to commercial entities, *see Reno I*, 521 U.S. at 877, 117 S. Ct. 2329, COPA's definition of "commercial purposes" nevertheless imposes content restrictions on a substantial number of "commercial," non- obscene speakers in violation of the First

Amendment. We are satisfied that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression.

(c) Affirmative Defenses

The Government argues that COPA's burdens are limited and reasonable, and points to COPA's affirmative defenses in support of the statute's constitutionality. We examine whether the affirmative defenses in COPA serve to tailor the statute narrowly, as the Government asserts.

COPA's affirmative defenses shield Web publishers from liability under the statute if they, in good faith, restrict access to material deemed harmful to minors. COPA provides as follows:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).[19]

[19] The District Court found, and the Government does not argue otherwise, that the "digital certificate" and "other reasonable measures" are not effective or feasible: "The parties' expert witnesses

The District Court held that COPA's affirmative defenses burdened otherwise protected adult speech in a way that prevented the statute from surviving strict scrutiny. In determining that the application of these defenses would unduly burden protected adult speech, the District Court concluded that

> Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications. The plaintiffs are likely to establish at trial that under COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. I conclude that based on the evidence presented to

agree that at this time, while it is technologically possible, *there is no certificate authority that will issue a digital certificate that verifies a user's age*. . . . The plaintiffs presented testimony that there are *no other reasonable alternatives that are technologically feasible* at this time to verify age online. . . . The defendant did not present evidence to the contrary." *Reno II*, 31 F. Supp.2d at 487-88 (Finding of Fact ¶ 37) (emphasis added) (internal citations omitted).

> date, the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults.

Reno II, 31 F.Supp.2d at 495 (citations omitted).

The Government maintains that the District Court overstated the burdens on protected speech created by utilization of COPA's affirmative defenses. The record and our own limited standard of review, however, belie that claim.

First, the actual effect on users as a result of COPA's affirmative defenses, which the Government minimizes, was determined by the District Court in its factual findings, after hearing testimony from both parties. Both the expert offered by the plaintiffs and one of the experts proffered by the Government testified that users could be deterred from accessing the plaintiffs' Web sites as a result of COPA's affirmative defenses. The plaintiffs' expert went on to testify that "economic harm . . . would result from loss of traffic." *Id.* at 491 (Finding of Fact ¶ 61).

Although the Government presented its own expert who testified that "COPA would not impose an unreasonable economic burden . . . on the seven Web sites of the plaintiffs," the District Court, in exercising its fact-finding function, determined that "plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens." *Id.* at 492 (Findings of Fact ¶¶ 61-62). We cannot say, nor has the Government claimed, that the District Court's factual determination is clearly erroneous.

COPA's restrictions on speech, as the District Court has found and as we agree, are not, as the Government has argued, analogous to the incidental restrictions caused by slow response times, broken links, or poor site design that "already inhibit a user's . . . experience." Orig. Gov't Br. at 42 (citation omitted); Gov't Br. on Remand at 40-41 (citation omitted). Requiring a user to pay a fee for use of an adult verification service or to enter personal information prior to accessing certain material constitutes a much more severe burden on speech than any technical difficulties, which are often repairable and cause only minor delays.

We agree with the District Court's determination that COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial.[20] People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records

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[20] The Government's argument to the contrary is not persuasive. Its reliance on the success of online publishers such as *The Wall Street Journal*, as well as online merchants such as Amazon.com, is misplaced. The Government noted that those publishers' and merchants' Web sites require persons to provide personal information. *See* Gov't Br. on Remand at 11. Such sites, however, are not analogous to Internet sites that provide speech that is protected for adults that might nonetheless be harmful to minors. As the District Court noted in its findings of fact, certain of the plaintiffs testified that their Web sites contain controversial or sensitive information that adult readers would be deterred from obtaining if they were required to register or otherwise identify themselves. *See Reno II*, 31 F. Supp.2d at 485-86 (Findings of Fact ¶¶ 25-26).

of various Web sites or providers of adult identification numbers.[21]

The Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech, because such restrictions can have an impermissible chilling effect on those would-be recipients.[22]

Second, the affirmative defenses do not provide the Web publishers with assurances of freedom from prose-

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[21] The Government asserts that 47 U.S.C. § 231(d)(1), which limits the disclosure of "any information collected for the purposes of restricting access" to material harmful to minors without prior written consent (subject to exceptions), constitute "substantial privacy protections." Gov't Br. on Remand at 41. But the statute does not appear to impose any penalties on those who fail to comply with the privacy protection in § 231(d)(1). Furthermore, the existence of the statutory privacy protection does not negate the likelihood that adults will be chilled in accessing speech protected for them; adults may reasonably fear that their information will be disclosed, this provision notwithstanding.

[22] See, e.g., *Lamont* v. *Postmaster General*, 381 U.S. 301, 85 S. Ct. 1493, 14 L.Ed.2d 398 (1965) (holding that federal statute requiring Postmaster to halt delivery of communist propaganda unless affirmatively requested by addressee violated First Amendment); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732-33, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (holding unconstitutional a federal law requiring cable operators to allow access to sexually explicit programming only to those subscribers who request access to the programming in advance and in writing). *Cf. American Library Ass'n v. United States*, 201 F. Supp.2d 401, 406 (E.D.Pa.) (three- judge court) (holding as unconstitutional federal statute that conditions receipt of federal funds by public libraries on use of filtering software because, *inter alia*, provision requiring adults to request library to disable filters to access protected speech imposed too great a burden), *prob. juris. noted*, — U.S. — -, 123 S. Ct. 551, 154 L. Ed.2d 424 (2002).

cution. As the Supreme Court noted in *Free Speech Coalition*, "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Free Speech Coalition*, 122 S. Ct. at 1404. Although the criminal penalties under the federal statute concerning virtual child pornography, at issue in *Free Speech Coalition*, were more severe than the penalties under COPA, the logic is applicable: "An affirmative defense applies only after prosecution has begun, and the speaker must himself prove . . . that his conduct falls within the affirmative defense." *Id.*

Lastly, none of the display-restriction cases relied on by the Government are apposite here, as each involved the use of blinder racks to shield minors from viewing harmful material on display. Orig. Gov't Br. at 43-44; Gov't Br. on Remand at 44-45; Gov't Reply Br. on Remand at 13-14.[23] The use of "blinder racks," or some

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[23] See, e.g., Crawford v. Lungren, 96 F.3d 380 (9th Cir.1996) (upholding statute banning sale of material harmful to minors in unsupervised sidewalk vending machines), *cert. denied*, 520 U.S. 1117, 117 S.Ct. 1249, 137 L.Ed.2d 330 (1997); *Webb*, 919 F.2d 1493 (11th Cir.1990) (upholding statute making it unlawful to "exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors" material harmful to them); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir.1985) (upholding an ordinance requiring an opaque cover on and the sealing of any material deemed harmful to minors and displayed for commercial purposes); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir.1983) (upholding a blinder rack ordinance); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn.1993) (upholding statute restricting the display for sale of material harmful to minors "anywhere minors are lawfully admitted"); *American Booksellers Ass'n v. Rendell*, 332 Pa. Super. 537, 481 A.2d 919

analogous device, does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens. Blinder racks do not require adults to compromise their anonymity in their viewing of material harmful to minors, nor do they create any financial burden on the user. Moreover, they do not burden the speech contained in the targeted publications any more than is absolutely necessary to shield minors from its content. We cannot say the same with respect to COPA's affirmative defenses.

The effect of the affirmative defenses, as they burden "material harmful to minors" which is constitutionally protected for adults, is to drive this protected speech from the marketplace of ideas on the Internet. This type of regulation is prohibited under the First Amendment. As the Supreme Court has recently said, "[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Free Speech Coalition*, 122 S. Ct. at 1402 (citation omitted). COPA, though less broad than the CDA, "effectively resembles [a] ban," on adults' access to protected speech; the chilling effect occasioned by the affirmative defenses results in the "unnecessarily broad suppression of speech addressed to adults." *Reno I*, 521 U.S. at 875, 117 S. Ct. 2329.

3. Least Restrictive Means

As we have just explained, COPA is not narrowly tailored and as such fails strict scrutiny. We are also satisfied that COPA does not employ the "least restrictive means" to effect the Government's compelling interest in protecting minors.

(1984) (upholding statute prohibiting display of sexually explicit materials where minors could see them).

The Supreme Court has stated that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000); *see also Reno I*, 521 U.S. at 874, 117 S. Ct. 2329 ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829.

The District Court determined, based on its findings of fact, that COPA would be of limited effectiveness in achieving its aim. *See Reno II*, 31 F.Supp.2d at 496 (COPA has "problems . . . with efficaciously meeting its goal."). To reach that conclusion, the District Court relied on its findings that (1) under COPA children may still be able to access material deemed harmful to them on "foreign Web sites, non-commercial sites, and . . . via protocols other than http," *id.* at 496; *see also id.* at 482-84, 492 (Findings of Fact ¶¶ 7-8, 19-20, 66); and (2) that children may be able to obtain credit cards—either their parents' or their own—legitimately and so circumvent the screening contemplated by COPA's affirmative defenses. *See id.* at 489 (Finding of Fact ¶ 48).

We first examine the alternative of blocking and filtering technology. The District Court described this technology as follows:

> [B]locking or filtering software may be used to block Web sites and other content on the Internet that is inappropriate for minors. Such technology may be downloaded and installed on a user's home computer at a price of approximately $40.00. Alternatively, it

> may operate on the user's ISP [(Internet Service Provider)]. Blocking technology can be used to block access by minors to whole sites or pages within a site.

Id. at 492 (Finding of Fact ¶ 65).[24] The District Court concluded that blocking and filtering technology, although imperfect, "may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users." *Id.* at 497. Indeed, the District Court found that blocking and filtering technology, if installed by parents, would shield minors from harmful Internet communication occurring within a broader range of venues than that covered by COPA: "Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP." *Id.* at 492 (Finding of Fact ¶ 65).

[24] The Report of the House Committee on Commerce, prepared in support of COPA, provides a more detailed discussion of this technology:

> In general, blocking or filtering software programs work in conjunction with Internet browsers such as Netscape Navigator and Microsoft's Internet Explorer, and are either installed directly onto individual computers or onto a host server used with a network of computers. Blocking or filtering software could also be installed at the site of the Internet access provider. Software to block access to websites has existed for many years. . . .
>
> In order to block Internet sites, a software vendor identifies categories of material to be restricted and then configures the software to block sites containing those categories of speech. Some software blocking vendors employ individuals who browse the Internet for sites to block, while others use automated searching tools to identify which sites to block. New products are constantly being developed, however, that could improve the effectiveness of the blocking software. For example, at least one product has been designed that is capable of analyzing the content being retrieved by the computer. By analyzing the content, rather than a predefined list of sites, the product is capable of screening inappropriate material from chat rooms, e-mail, attached documents, search engines, and web browsers. Such products will help parents and educators reduce a minor's exposure to sexually explicit material.

H.R. REP. No. 105-775, at 19.

The Government, however, argues that filtering software is not a viable means of protecting children from harmful material online because it is not nearly as effective as COPA at protecting minors. The Government offers the following three reasons for this conclusion: (1) filtering software is voluntary—it transfers the burden of protecting children from the source of the harmful material, i.e., the Web publishers, to the potential victims and their parents; (2) filtering software is often both over- and underinclusive of targeted material; and (3) it is more effective to screen material "prior to it being sent or posted to minors" on the Internet. *See* Gov't Br. on Remand at 47.[25]

[25] We see no need for sustained discussion of the Government's third argument. The Government's assertion that it is more effective to screen material before it is posted on the Internet, is no answer at all. First, we cannot say that the blocking and filtering technology is sufficiently less effective than COPA such that the technology could not be considered as an alternative for purposes of the least restrictive means analysis. Second, to the extent that the Government relies on pre- screening as the rationale for claiming that COPA is more effective, the argument proves too much. It is of course true that Web publishers' self- censorship will reduce the potential for communication of material harmful to

The Government makes much of the notion that the voluntary use of blocking and filtering software places an onus on parents. *Id.* (noting "the concern that the expense of purchasing and updating such software programs might 'discourage adults or schools from using them.'") (quoting H.R.REP. No. 105-775, at 19-20).

But the Supreme Court has effectively answered this contention. The Court stated in *Playboy*, "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 805, 120 S. Ct. 1878. The *Playboy* Court held unconstitutional a federal statutory provision that required cable operators who provide channels primarily dedicated to sexually-oriented programming to scramble or block those channels completely, or to "time channel" their transmission, i.e., limit their availability to hours between 10 p.m. and 6 a.m., when, in Congress's view, children are unlikely to be viewing television. By this provision Congress sought to prevent children's exposure to content contained on such channels as a result of "signal bleed."[26]

The Court determined that this provision constituted a "significant restriction of [protected] communication between speakers and willing adult listeners." *Id.* at 812, 120 S. Ct. 1878. The Court held that this provision failed strict scrutiny because Congress had available to it an effective, less restrictive means of achieving its

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minors, but the cost results in an intolerable chilling effect. *See* Part II.A.2(c), *supra*.

[26] "Signal bleed" refers to a phenomenon whereby scrambled programming becomes visible or audible from time to time. *Playboy*, 529 U.S. at 807, 120 S. Ct. 1878.

ends. In particular, Congress had provided for an "opt-out" provision whereby a cable subscriber could request the cable company to scramble fully or block completely the receipt of sexually explicit channels. The Court explained that the voluntary nature of the "opt-out" provision rendered it less restrictive: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Id.* at 824, 120 S. Ct. 1878. Instead, the Court explained that reliance upon "informed and empowered parents," *id.* at 825, 120 S. Ct. 1878, was the preferable alternative:

> The regulatory alternative of a publicized ["opt-out" provision], which has . . . the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.

Id. at 825-26, 120 S. Ct. 1878.

In *Fabulous Associates Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780 (3d Cir. 1990), we had held unconstitutional a Pennsylvania law that required adults to obtain nine-digit access codes in order to listen to dial-a-porn messages on their telephones. We held that the statute was not the least restrictive means of achieving the state's interest in protecting minors from such messages because it required a loss of anonymity on the part of adults. Although we recognized that pre-blocking would not protect minors in homes where adult residents had unblocked the lines, we held that the "responsibility for making such choices

[between individually accessing such speech and protecting minor dependents from that speech] is where our society has traditionally placed it—on the shoulders of the parent." *Id.* at 788 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983)).

As with the "opt-out" alternative available in *Playboy*, which would allow parents to block sexually-oriented cable channels effectively, and as with the pre-blocking alternative described in *Fabulous Associates*, here filtering software is a less restrictive alternative that can allow parents some measure of control over their children's access to speech that parents consider inappropriate.[27]

The Government also argues that the blocking and filtering software is not as effective as COPA in that it is both over- and underinclusive. To be sure, blocking and filtering software may sometimes block too little and sometimes block too much Internet speech. As the District Court found, blocking and filtering technology is not perfect in that "some Web sites that may be deemed inappropriate for minors may not be blocked while some Web sites that are not inappropriate for minors may be blocked." *Reno II*, 31 F.Supp.2d at 492 (Finding of Fact ¶ 66). The District Court found, however, that no evidence had been presented "as to the percentage of time that blocking and filtering technology is over- or underinclusive." *Id.* Moreover, the District Court, as noted above, determined that blocking and filtering software could be at least as effective

[27] We recognize that parents may face financial costs in purchasing such software. *See Reno II*, 31 F.Supp.2d at 492 (Finding of Fact ¶ 65) ("Such technology may be downloaded and installed on a user's home computer at a price of approximately $40.00.").

as COPA, because COPA does not reach "foreign Web sites, noncommercial sites, and . . . [materials available online] via protocols other than http." *Reno II*, 31 F.Supp.2d at 496.[28]

A three-judge court has recently held that a federal law requiring the use of filtering and blocking software on computers at libraries that received federal funding violates the First Amendment. *See American Library Ass'n v. United States*, 201 F. Supp.2d 401, 406 (E.D. Pa.) (three-judge court), *prob. juris. noted*, — U.S. ——, 123 S. Ct. 551, 154 L. Ed.2d 424 (2002). This decision does not compel a different result here. In that case, the *American Library* court noted that blocking and filtering technology overblocks and underblocks Internet content.[29] That decision, however, is distin-

[28] The District Court's findings of fact on which the above conclusions are based are not clearly erroneous. As we recited earlier, the Government did not, and does not, contend that the findings are clearly erroneous. *See Reno III*, 217 F.3d at 170. It follows that both COPA and blocking and filtering technology are over- and underinclusive in differing ways, and we agree with the District Court's conclusion that as a result, such technology may be at least as effective as COPA.

For further discussion of COPA's overinclusiveness, see our discussion of overbreadth, *infra*.

[29] As the *American Library* court explained:

> Although [blocking and filtering software] programs are somewhat effective in blocking large quantities of pornography, they are blunt instruments that not only "underblock," i.e., fail to block access to substantial amounts of content that the library boards wish to exclude, but also, central to this litigation, "overblock," i.e., block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected.

American Library, 201 F.Supp.2d at 406.

guishable because, whereas the Act at issue in *American Library* involved Government-mandated use of blocking and filtering software, here we only consider the *voluntary* use of such software by parents who have chosen to use this means to protect their children. We also note that, in *American Library*, the Government sought to defend the legislation at issue by reference to the statute's "disabling provision," which *required* adults to identify themselves to librarians in order to disable the filtering software on library computers, and thus gain unfettered access to the wide range of speech on the Internet. The court held that this "disabling provision" created a chilling effect on adult library patrons' access to protected speech,[30] just

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In addition, we recognize that a report approved by the governing board of the National Research Council, by a committee chaired by the Honorable Dick Thornburgh, four years after COPA was enacted (2002), similarly concluded that:

> Filters are capable of blocking inappropriate sexually explicit material at a high level of effectiveness—if a high rate of overblocking is also acceptable. Thus, filters are a reasonable choice for risk-averse parents or custodians (e.g., teachers) who place a very high priority on preventing exposure to such material and who are willing to accept the consequences of such overblocking.

COMMITTEE TO STUDY TOOLS AND STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY. NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET § 12.1.8 (Dick Thornburgh & Herbert S. Lin eds., 2002), *available at http://www.nap.edu/html/youth_internet/* (last visited Feb. 6, 2003).

[30] *See American Library*, 201 F.Supp.2d at 486 ("By requiring library patrons affirmatively to request permission to access certain speech singled out on the basis of its content, [the federal law at issue] will deter patrons from requesting that a library disable filters to allow the patron to access speech that is constitutionally protected, yet sensitive in nature.").

as we have determined that COPA's affirmative defenses, by requiring the use of a credit card or adult identification number, similarly place an impermissible burden on adult users.

We agree with the District Court that the various blocking and filtering techniques which that Court discussed may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material. We are influenced further in this conclusion by our reading of the Report of the House Committee on Commerce, which had advocated the enactment of COPA. *See* H.R. REP. No. 105-775 (1998). That Report described a number of techniques and/or alternatives to be used in conjunction with blocking and filtering software, although the techniques were not adopted at that time. In each instance, these techniques would appear to constitute a less restrictive alternative than COPA's prescriptions. Moreover, we are at least four years beyond the technology then considered by the Committee, and as we had initially observed, "in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible." *Reno III*, 217 F.3d at 166.

Because the techniques and/or alternatives considered by the Committee (i.e., "tagging," "domain name zoning," etc.), *see* H.R. REP. No. 105-775, at 16-20, were not addressed either by the parties or the District Court, we do not rely upon them here. We do no more than draw attention to the fact that other possibly less restrictive alternatives existed when COPA was enacted and more undoubtedly will be available in the

future—many of which might well be a less restrictive alternative to COPA.[31]

The existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny. As the Supreme Court has said:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties . . . and the benefit gained must outweigh the loss of constitutionally protected rights.

Elrod v. Burns, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L. Ed.2d 547 (1976) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S. Ct. 303, 38 L. Ed.2d 260 (1973)).

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[31] Indeed, as the National Research Council's report noted:

> [T]he problem of protecting children from inappropriate material and experiences on the Internet is complex. . . .
>
> The effectiveness of technology—based on tools and social and educational strategies in practice, should be examined and characterized. Chapter 12 [of this Report] discussed one aspect of evaluating the performance of filters, based on a "head-to-head" comparison of how filters performed in blocking inappropriate materials. But protection of children is a holistic enterprise that must account for the totality of their Internet experience—which suggests the need for a examination of all of the tools in all of the venues in which children use the Internet.

YOUTH, PORNOGRAPHY AND THE INTERNET, *supra* note 29, at § 14.6.

In sum, the District Court did not abuse its discretion in granting the plaintiffs a preliminary injunction on the grounds that COPA, in failing to satisfy strict scrutiny, had no probability of success on the merits. COPA is clearly a content-based restriction on speech. Although it does purport to serve a compelling governmental interest, it is not narrowly tailored, and thus fails strict scrutiny. COPA also fails strict scrutiny because it does not use the least restrictive means to achieve its ends. The breadth of the "harmful to minors" and "commercial purposes" text of COPA, especially in light of applying community standards to a global medium and the burdens on speech created by the statute's affirmative defenses, as well as the fact that Congress could have, but failed to employ the least restrictive means to accomplish its legitimate goal, persuade us that the District Court did not abuse its discretion in preliminarily enjoining the enforcement of COPA.

B. Overbreadth

Though the Supreme Court held in *Ashcroft* that COPA's reliance on community standards did not alone render the statute overbroad, the Court specifically declined to "express any view as to whether COPA suffers from substantial overbreadth for other reasons [or] whether the statute is unconstitutionally vague," instead explaining that "prudence dictates allowing the Court of Appeals to first examine these difficult issues." *Ashcroft*, 122 S. Ct. at 1713. In this Part, therefore, we discuss whether COPA is substantially overbroad, and hold that it is.[32]

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[32] The Supreme Court has explained that it has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S. Ct.

In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed.2d 830 (1973), the Supreme Court ruled that a statute that burdens otherwise protected speech is facially invalid if that burden is not only real, but "substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. 2908. As the Court has recently stated, "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Free Speech Coalition*, 122 S. Ct. at 1404.[32]

Our analysis of whether COPA is overbroad is akin to the portion of the strict scrutiny analysis we have conducted in which we concluded that COPA is not

1855, 75 L.Ed.2d 903 (1983) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 609, 87 S. Ct. 675, 17 L.Ed.2d 629 (1967); *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). We consider an aspect of the statute that we consider vague in note 37, *infra*.

[33] In assessing facial challenges of overbreadth, as we do here, the courts have "altered [their] traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick*, 413 U.S. at 612, 93 S. Ct. 2908 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L.Ed.2d 22 (1965)). This exception to traditional rules of standing "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 38, 120 S. Ct. 483, 145 L.Ed.2d 451 (1999) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-521, 92 S. Ct. 1103, 31 L. Ed.2d 408 (1972)). The District Court held that the plaintiffs had standing. *See Reno II*, 31 F.Supp.2d at 479. We agree. *See Reno III*, 217 F.3d at 171.

narrowly tailored. Overbreadth analysis—like the question whether a statute is narrowly tailored to serve a compelling governmental interest—examines whether a statute encroaches upon speech in a constitutionally overinclusive manner.

We conclude that the statute is substantially overbroad in that it places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech. In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors. *See Ginsberg*, 390 U.S. at 639-43, 88 S. Ct. 1274; *see also, e.g., Sable*, 492 U.S. at 126, 109 S. Ct. 2829; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

1. "Material Harmful to Minors"

First, COPA's definition of "material harmful to minors" impermissibly places at risk a wide spectrum of speech that is constitutionally protected. As we have discussed in our strict scrutiny analysis, two of the three prongs of the "harmful to minors" test—the "serious value" and "prurient interest" prongs— contain requirements that material be "taken as a whole." *See* 47 U.S.C. § 231(e)(6)(C). We have earlier explained that the First Amendment requires the consideration of context. COPA's text, however, as we have interpreted it, *see* Part II.A.2(a), *supra*, calls for evaluation of "any material" on the Web *in isolation*. Such evaluation *in isolation* results in significant overinclusiveness. Thus, an isolated item located somewhere on a Web site that meets the "harmful to minors" definition can subject

the publisher of the site to liability under COPA, even though the entire Web page (or Web site) that provides the context for the item would be constitutionally protected for adults (and indeed, may be protected as to minors).

An examination of the claims of certain amici curiae that COPA threatens their speech illustrates this problem. For example, amicus California Museum of Photography/University of California at Riverside, maintains a Web site that, among other things, displays artwork from the museum's collection. The Web site contains a page that introduces the "photographers" section of the Web site. *See* California Museum of Photography/University of California at Riverside, *UCR/CMP Photographers, at http://www.cmp.ucr.edu/photos/photographers.html* (last visited Feb. 6, 2003).[34] This Web page contains several photographs, each which serves as a link to that museum's on-line exhibit on a particular photographer. One of these photographs on the introductory page, by Lucien Clergue, links to the museum's exhibit of his work. This photograph is of a naked woman whose "post-pubescent female breast," 47 U.S.C. § 231(e)(6)(B), is exposed.

Viewing this photograph "as a whole," but without reference to the surrounding context, as per COPA's definition of "material," the photograph arguably meets the definition of "harmful to minors." Yet, this same photograph, when treated in context as a component of the entire Web page, cannot be said to be "harmful to minors." In the context of the Web page, which displays several art exhibits, none of which are even arguably "harmful to minors," the Clergue photograph and its surroundings would have "serious [artistic] value." Of course, it would also be protected speech as to adults.[35]

[34] The Web site page can be reached by accessing the museum's main Web page at *http://www.cmp.ucr.edu* and then by clicking on a link marked "photographers."

As another example, amicus Safer Sex Institute publishes a Web site that contains sexual health and educational materials. On one page of this Web site is a textual description of how to use a condom with accompanying graphic drawings. *See* Safer Sex Institute, *safersex / a journal of safer sex, http://safersex.org/condoms/how.to.use/* (last visited Feb. 6, 2003). The page lists six steps for properly using a condom. Next to this text are four drawings that detail how to place a condom on the penis and how to remove it after sex. Three of these drawings each "exhibit[ ] . . . the genitals." 47 U.S.C. § 231(e)(6)(B). An evaluation of any of these three drawings alone, all of which depict an erect

[35] Another such example is noted in the American Society of Journalists' amicus brief. *See* Br. of Amici Curiae American Society of Journalists and Authors et al. at 23 n. 19. The American Society points to the work of photographer Paul Outerbridge as displayed on the J. Paul Getty Museum Web site. The Web site includes a Web page featuring a discussion of Outerbridge and containing three small photographs, one of which is entitled "Woman with Meat Packer's Gloves." *See* J. Paul Getty Museum, *Paul Outerbridge (Getty Museum), http://www.getty.edu/art/collections/bio/a1971-1.html* (last visited Feb. 6, 2003). The museum describes this photograph as a ("disturbing image of a [naked] woman piercing her own breast and abdomen with the sharp tips of meat packer's gloves."). This photograph in isolation arguably meets COPA's "harmful to minors" definition. When viewed in the context of the Web page discussing the artist and displaying his other art work, however, this image, as a component of the Web page in its entirety, does not meet the "harmful to minors" standard.

penis "as a whole," might lead to the conclusion that they fit the "harmful to minors" standard. Yet, these same drawings, viewed in the larger context of the Web page, which provides instruction on the proper use of a condom, is protected speech as to adults.[36] We also note that the same Web page provides links to other information within the same Web site of potential importance to adults (and possibly certain minors) regarding safe sex.

As these examples illustrate—and they are but a few of the very many produced by the plaintiffs and the amici—the burden that COPA would impose on harmless material accompanying such single images causes COPA to be substantially overinclusive.

2. "Minor"

As we have earlier explained, the term "minor" appears in all three prongs of the statute's modified-for-minors *Miller* test. COPA's definition of a "minor" as any person under the age of seventeen serves to place at risk too wide a range of speech that is protected for adults. The type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old.

Thus, for example, sex education materials may have "serious value" for, and not be "patently offensive" as to, sixteen-year-olds. The same material, however, might well be considered "patently offensive" as to, and

[36] Indeed, though we do not reach this issue, we note that this speech may not even be obscene as to minors, at least as to older minors, because it arguably has "serious value" for them.

without "serious value" for, children aged, say, ten to thirteen, and thus meet COPA's standard for material harmful to minors.

Because COPA's definition of "minor" therefore broadens the reach of "material that is harmful to minors" under the statute to encompass a vast array of speech that is clearly protected for adults—and indeed, may not be obscene as to older minors—the definition renders COPA significantly overinclusive.[37]

[37] We also consider the use of the term "minor," as incorporated in COPA's definition of "material that is harmful to minors," to be impermissibly vague. A statute is void for vagueness if it "forbids ... the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 432-33, 83 S. Ct. 328. *See also Reno I*, 521 U.S. at 871-72, 117 S. Ct. 2329 (because the CDA was "a content-based regulation of speech," its "vagueness . . . raise[d] special First Amendment concerns because of its obvious chilling effect on free speech"). COPA's definition of "minor" includes all children under the age of seventeen, as we have noted. Because the statute's definition of minor is all-inclusive, and provides no age "floor," a Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies. The fearful Web publisher therefore will be forced to assume, and conform his conduct to, the youngest minor to whom the statute conceivably could apply. We cannot say whether such a minor would be five years of age, three years, or even two months. Because we do not think a Web publisher will be able to make such a determination either, we do not think that they have fair notice

3. "Commercial Purposes"

COPA's purported limitation of liability to persons making communications "for commercial purposes" does not narrow the sweep of COPA sufficiently. Instead, the definition subjects too wide a range of Web publishers to potential liability. As we have explained, under the plain language of COPA, a Web publisher will be subjected to liability due to the fact that even a small part of his or her Web site has material "harmful to minors." Furthermore, because the statute does not require that a Web publisher seek profit as a sole or primary objective, COPA can reach otherwise non-commercial Web sites that obtain revenue through advertising. We have explored this subject in greater detail in the strict scrutiny section of this opinion. The conclusion we reach there is every bit as relevant here.

4. Affirmative Defenses

The affirmative defenses do not save the statute from sweeping too broadly. First, the affirmative defenses, if employed by Web publishers, will result in a chilling effect upon adults who seek to view, and have a right to access, constitutionally protected speech. Compliance with COPA's affirmative defenses requires that Web publishers place obstacles in the way of adults seeking to obtain material that may be considered harmful to minors under the statute. As the District Court found, these barriers, which would require adults to identify

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of what conduct would subject them to criminal sanctions under COPA. As a result of this vagueness, Web publishers will be deterred from engaging in a wide range of constitutionally protected speech. The chilling effect caused by this vagueness offends the Constitution.

themselves as a precondition to accessing disfavored speech, are likely to deter many adults from accessing that speech.

Second, the affirmative defenses impose a burden on Web publishers, and as such, do not alleviate the chilling effect that COPA has on their speech. Web publishers will be forced to take into account the chilling effect that COPA's affirmative defenses have on adult Web users. Consequently, COPA will cause Web publishers to recoil from engaging in such expression at all, rather than availing themselves of the affirmative defenses. Additionally, the financial costs of implementing the barriers necessary for compliance with COPA may further deter some Web publishers from posting protected speech on their Web sites.

Moreover, because the affirmative defenses are not included as elements of the statute, Web publishers are saddled with the substantial burden of proving that their "conduct falls within the affirmative defense." *Free Speech Coalition*, 122 S. Ct. at 1404.

Thus, the affirmative defenses do not cure nor diminish the broad sweep of COPA sufficiently.

5. "Community Standards"

As the Supreme Court has now explained, community standards by itself did not suffice to render COPA substantially overbroad. Justice Kennedy's concurring opinion, however, explained that community standards, in conjunction with other provisions of the statute, might render the statute substantially overbroad. *See Ashcroft*, 122 S.Ct. at 1720 (Kennedy, J., concurring) ("We cannot know whether variation in community standards renders the Act substantially

overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.").

As we have just discussed earlier, the expansive definitions of "material harmful to minors" and "for commercial purposes," as well as the burdensome affirmative defenses, likely render the statute substantially overbroad. COPA's application of "community standards" exacerbates these constitutional problems in that it further widens the spectrum of protected speech that COPA affects. As we said in our original decision, "COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability." *Reno III*, 217 F.3d at 166; *see also Ashcroft*, 122 S. Ct. at 1719 (Kennedy, J., concurring) ("if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web.").

The "community standards" requirement, when viewed *in conjunction with* the other provisions of the statute—the "material harmful to minors" provision and the "commercial purposes" provisions, as well as the affirmative defenses—adds to the already wide range of speech swept in by COPA. Because the community standards inquiry further broadens the scope of speech covered by the statute, the limitations that COPA purports to place on its own reach are that much more ineffective.

6. Unavailability of Narrowing Construction

Before concluding that a statute is overbroad, we are required to assess whether it is subject to "a narrowing construction that would make it constitutional." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988). We may impose such a narrowing construction, however, "only if it is readily susceptible to such a construction," *Reno I*, 521 U.S. at 884, 117 S. Ct. 2329, because courts "will not rewrite a . . . law to conform it to constitutional requirements." *American Booksellers*, 484 U.S. at 397, 108 S.Ct. 636. As the Supreme Court once noted, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221, 23 L. Ed. 563 (1875).

We originally declined to redraw COPA when we held that the "contemporary community standards" rendered the statute overbroad; we certainly decline to perform even more radical surgery here. In order to satisfy the constitutional prerequisites consistent with our holding today, we would be required, *inter alia*, to redraw the text of "commercial purposes" and redraw the meaning of "minors" and what is "harmful to minors," including the reach of "contemporary community standards." We would also be required to redraw a new set of affirmative defenses. Any attempt to resuscitate this statute would constitute a "serious invasion of the legislative domain." *United States v.*

National Treasury Employees Union, 513 U.S. 454, 479 n. 26, 115 S. Ct. 1003, 130 L.Ed.2d 964 (1995).

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Accordingly, we hold that the plaintiffs will more probably prove at trial that COPA is substantially overbroad, and therefore, we will affirm the District Court on this independent ground as well.

III.

This appeal concerns the issuance of a preliminary injunction pending the resolution of the merits of the case. Because the ACLU will likely succeed on the merits in establishing that COPA is unconstitutional because it fails strict scrutiny and is overbroad, we will affirm the issuance of a preliminary injunction.

APPENDIX A

CHILD ONLINE PROTECTION ACT

47 U.S.C. § 231

Restriction of access by minors to materials commercially distributed by means of world wide web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material

that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is–

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or

alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 shall not constitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a)–

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection, the following definitions shall apply:

(1) By means of the world wide web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

(5) Internet information location tool

The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

(6) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to

minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION;
ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT
LIGHT BOOKSTORES; AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION;
ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;
ADDAZI INC. D/B/A CONDOMANIA;
ELECTRONIC FRONTIER FOUNDATION;
ELECTRONIC PRIVACY INFORMATION CENTER;
FREE SPEECH MEDIA; INTERNET CONTENT
COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;
POWELL'S BOOKSTORE; RIOTGRRL;
SALON INTERNET, INC.; WEST STOCK, INC.;
PLANETOUT CORPORATION

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

[Argued: Nov. 4, 1999
Opinion filed: June 22, 2000]

Before: NYGAARD, MCKEE Circuit Judges and GARTH, Senior Circuit Judge

OPINION OF THE COURT

GARTH, Circuit Judge:

This appeal "presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of minors." *American Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990). The government challenges the District Court's issuance of a preliminary injunction which prevents the enforcement of the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231) ("COPA"), enacted in October of 1998. At issue is COPA's constitutionality, a statute designed to protect minors from "harmful material" measured by "contemporary community standards" knowingly posted on the World Wide Web ("Web") for commercial purposes.[1]

We will affirm the District Court's grant of a preliminary injunction because we are confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits. Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geo-

[1] The District Court exercised subject matter jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 1331. This court exercises appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which provides a court of appeals with jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions . . . except where a direct review may be had in the Supreme Court."

graphic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is based on identifying "contemporary community standards," the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.

In affirming the District Court, we are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

I. BACKGROUND

COPA was enacted into law on October 21, 1998. Commercial Web publishers subject to the statute that distribute material that is harmful to minors are required under COPA to ensure that minors do not access the harmful material on their Web site. COPA is Congress's second attempt to regulate the dissemination to minors of indecent material on the Web/Internet. The Supreme Court had earlier, on First Amendment grounds, struck down Congress's first endeavor, the Communications Decency Act, ("CDA") which it passed as part of the Telecommunications Act

of 1996.[2] *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno II*"). To best understand the current challenge to COPA, it is necessary for us to briefly examine the CDA.

A. CDA

The CDA prohibited Internet users from using the Internet to communicate material that, under contemporary community standards, would be deemed patently offensive to minors under the age of eighteen. *See Reno II*, 521 U.S. at 859-60, 117 S. Ct. 2329.[3] In so

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[2] For ease of reference the various applicable cases will be referred to as follows: *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), hereinafter "*Reno I*" (addressing CDA); *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997), hereinafter "*Reno II*" (striking down the CDA as unconstitutional); *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999), hereinafter "*Reno III*" (case currently on appeal addressing constitutionality of COPA).

[3] The Communications Decency Act, 47 U.S.C. § 223(d) provides that:

> Whoever—
>
> "(1) in interstate or foreign communications knowingly—"
>
> "(A) uses an interactive computer service to send a specific person or persons under 18 years of age, or"
>
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or' "
>
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity"
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

restricting Internet users, the CDA provided two affirmative defenses to prosecution; (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors. *See id.* at 860, 117 S. Ct. 2329. In holding that the CDA violated the First Amendment, the Supreme Court explained that without defining key terms the statute was unconstitutionally vague. Moreover, the Court noted that the breadth of the CDA was "wholly unprecedented" in that, for example, it was "not limited to commercial speech or commercial entities . . . [but rather] [i]ts open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers." *Id.* at 877, 117 S. Ct. 2329.

Further, the Court explained that, as applied to the Internet, a community standards criterion would effectively mean that because all Internet communication is made available to a worldwide audience, the content of the conveyed message will be judged by the standards of the community most likely to be offended by the content. *See id.* at 877-78. Finally, with respect to the affirmative defenses authorized by the CDA, the Court concluded that such defenses would not be economically feasible for most noncommercial Web publishers, and that even with respect to commercial publishers, the technology had yet to be proven effective in shielding

minors from harmful material. *See id.* at 881. As a result, the Court held that the CDA was not tailored so narrowly as to achieve the government's compelling interest in protecting minors, and that it lacked the precision that the First Amendment requires when a statute regulates the content of speech. *See id.* at 874. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (U.S. 2000).

B. COPA

COPA, the present statute, attempts to "address[ ] the specific concerns raised by the Supreme Court" in invalidating the CDA. H.R. REP. NO. 105-775 at 12 (1998); *See* S.R. REP. NO. 105-225, at 2 (1998). COPA prohibits an individual or entity from:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.

47 U.S.C. § 231(a)(1) (emphasis added). As part of its attempt to cure the constitutional defects found in the CDA, Congress sought to define most of COPA's key terms. COPA attempts, for example, to restrict its scope to material on the Web rather than on the Internet as a whole;[4] to target only those Web communications made for "commercial purposes";[5] and to limit its scope to only that material deemed "harmful to minors."

[4] COPA defines the clause "by means of the World Wide Web" as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." 47 U.S.C. § 231(e)(1).

Under COPA, whether material published on the Web is "harmful to minors" is governed by a three-part test, *each* of which must be found before liability can attach:[6]

> (A) the average person, applying *contemporary community standards*, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

[5] COPA defines the clause "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, COPA defines a person "engaged in the business" as one

> who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

Id. § 231(e)(2)(B).

[6] In the House Report that accompanied the bill that eventually became COPA, this "harmful to minors" test attempts to conform to the standards identified by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), as modified by *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) in identifying "patently offensive" material. *See* H.R. REP. NO. 105-775, at 13 (1998).

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious, literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6) (emphasis added).[7] The parties conceded at oral argument that this "contemporary community standards" test applies to those communities within the United States, and not to foreign communities. Therefore, the more liberal community standards of Amsterdam or the more restrictive community standards of Tehran would not impact upon the analysis of whether material is "harmful to minors" under COPA.

COPA also provides Web publishers subject to the statute with affirmative defenses. If a Web publisher "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number . . . a digital certificate that verifies age . . . or by any other reasonable measures that are feasible under available technology," then no liability will attach to the Web publisher even if a minor should nevertheless gain access to restricted material

[7] Under COPA, a minor is defined as one under age seventeen. *See* 47 U.S.C. § 231(e)(7).

under COPA. 47 U.S.C. § 231(c)(1).[8] COPA violators face both criminal (maximum fines of $50,000 and a maximum prison term of six months, or both) and civil (fines of up to $50,000 for each day of violation) penalties.[9]

C. Overview of the Internet and the World Wide Web

In recent years use of the Internet and the Web has become increasingly common in mainstream society. Nevertheless, because the unique character of these new electronic media significantly affect our opinion today, we briefly review their relevant elements.[10]

The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world, and is capable of quickly transmitting communications. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997); *ACLU v. Reno*, 31 F. Supp.2d 473, 481 (E.D. Pa. 1999) ("*Reno III*"). Even though the Internet appears to be a "single, integrated system" from a user's perspective, in fact no single organization or entity controls the Internet. *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996) ("*Reno I*"); *Reno III*, 31 F. Supp.2d at 484. As

[8] The defense also applies if an individual or entity attempts "in good faith to implement a defense" listed above. *See id.* 47 U.S.C. § 231(c)(2).

[9] An individual found to have intentionally violated COPA also faces an additional fine of not more than $50,000 for each day of violation. *See* 47 U.S.C. § 231(a)(2).

[10] For more thorough descriptions of the Internet and the Web *see e.g.*, *Reno I*, 929 F. Supp. 824, 830-45; *Reno II*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874; *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164-67 (S.D.N.Y. 1997); *Hearst Corp. v. Goldberger*, 1997 WL 97097 *1 (S.D.N.Y. Feb. 26, 1997) (citing cases).

a result, there is no "centralized point from which individual Web sites or services can be blocked from the Web." *Id.* Although estimates are difficult because of the Internet's rapid growth, it was recently estimated that the Internet connects over 159 countries and more than 109 million users. *See ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999).

The World Wide Web is a publishing forum consisting of millions of individual "Web sites" each containing information such as text, images, illustrations, video, animation or sounds provided by that site's creator. *See American Libraries*, 969 F. Supp. at 166. Some of these Web sites contain sexually explicit material. *See Reno III*, 31 F. Supp.2d at 484. As a publishing forum, the Web is the best known method of communicating information online. *See id.* Information is said to be published on the Web as soon as it is made available to others by connecting the publisher's computer to the Internet. *See Reno I*, 929 F. Supp. at 844; *Reno III*, 31 F. Supp.2d at 483. Each site is connected to the Internet by means of certain protocols that permit "the information to become part of a single body of knowledge accessible by all Web visitors." *American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483.[11] As a part of this unified body of knowledge,

[11] A user who wishes to access the Web resources employs a "browser." Browser software—such as Netscape Navigator, Mosaic, or Internet Explorer—enables the user to display, print, and download documents that are formatted in the standard Web formatting language. *See American Libraries*, 969 F. Supp. at 166. The Web "uses a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound, animation and moving video stored in many other formats. . . .

Web pages are all linked together so that the Internet user can freely move from one Web page to another by "clicking" on a "link." *See id.* Because the Internet has an "international, geographically-borderless nature,"[12] with the proper software every Web site is accessible to all other Internet users worldwide. *See American Libraries*, 969 F. Supp. at 166; *Reno I*, 929 F. Supp. at 837; *Reno III*, 31 F. Supp.2d at 483-84. Indeed, the Internet "negates geometry . . . it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The [Internet] is ambient—nowhere in particular and everywhere at once." *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951, 956 (1998).

It is essential to note that under *current* technology, Web publishers cannot "prevent [their site's] content from entering any geographic community." *Reno III*, 31 F. Supp.2d at 484. As such, Web publishers cannot prevent Internet users in certain geographic locales from accessing their site; and in fact the Web publisher will not even know the geographic location of visitors to its site. *See American Libraries*, 969 F. Supp. at 171. Similarly, a Web publisher cannot modify the content of its site so as to restrict different geographic communities to access of only certain portions of their site.

[Hyperlinks] allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world." *Reno III*, 31 F. Supp.2d at 483.

[12] *People v. Barrows*, 177 Misc.2d 712, 729, 677 N.Y.S.2d 672 (N.Y. 1998)-

Thus, once published on the Web, existing technology does not permit the published material to be restricted to particular states or jurisdictions.

D. Procedural History

On October 22, 1998, the day after COPA was enacted, the American Civil Liberties Union ("ACLU") brought the present action in the United States District Court for the Eastern District of Pennsylvania, challenging COPA's constitutionality and seeking to enjoin its enforcement.[13] After granting a temporary restraining order against enforcement of the law on November 20, 1998, the District Court held extensive evidentiary hearings which, on February 1, 1999, resulted in the entry of a preliminary injunction preventing the government from enforcing COPA.

E. District Court's Findings of Fact

After five days of testimony, the District Court rendered sixty-seven separate findings of fact concerning the Internet, the Web, and COPA's impact on speech activity in this relatively-new medium. *See Reno III*, 31 F. Supp.2d at 482-92. It bears noting that none of the parties dispute the District Court's findings (including those describing the Internet and the Web), nor are any challenged as clearly erroneous. Thus, we accept these findings.

The District Court first rendered findings concerning the physical medium known as the Internet, which it

[13] Other parties joined the ACLU in asserting the unconstitutionality of COPA. For ease of reference, we will refer to all party-plaintiffs as "ACLU" throughout this opinion.

recognized consisted of many different methods of communication, only one of which is the World Wide Web. *See Reno III*, 31 F. Supp.2d at 482-83. It found that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographical community." *Id.*

The Court then made findings as to the costs and burdens COPA imposes on Web publishers and on the adults who seek access to sites covered by COPA. *See Reno III*, 31 F. Supp.2d at 482-492. As observed earlier, the statute provides for a limited number of defenses for Web publishers. *See* 47 U.S.C. § 231(c).[14] The Court found that as a technological matter the only affirmative defenses presently available are the implementation of credit card or age verification systems because there is no currently functional digital certificate or other reasonable means to verify age. *See Reno III*, 31 F. Supp.2d at 487.

With respect to the credit card option, the court found that the cost to Web publishers could range from

[14] The statute provides:

> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors–
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number,
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

See 47 U.S.C. § 231(c).

$300 to "thousands of dollars" (exclusive of transaction fees incurred from each verification). *Id.* at 488. These costs were also exclusive, according to the court, of the labor and energy that would be required of the Web publisher to implement such a system. *Id.* This labor and energy would include reorganizing a particular Web site to ensure that material considered "harmful to minors" could only be accessed after passing through a credit card or other age verification system. *See id.* at 490. With this in mind, the court found, for example, that textual material that consisted primarily of non-sexual material, but also included some content that was "harmful to minors" would also be subject to such age verification systems. *See id.*

As for age verification systems, the District Court's findings were more optimistic. The court found that a Web publisher "can sign up for free with Adult Check [one company providing such a service] to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by [their] users." *Id.* at 489. The District Court also downplayed the cost (both in price and in energy) that would be incurred by the individual seeking to access "harmful to minors" material on the Web, finding that an Adult Check password could be easily purchased for only $16.95. *See id.* at 490.[15] The same burdens concerning the reorganization of a particular Web site mentioned above would, of course, equally apply to a Web publisher that elected to utilize a PIN number for age verification.

[15] It now seems that those with a valid credit card who wish to acquire an adult PIN may do so without cost using a Web service such as www.freecheck.com.

Either system, according to the District Court, would impose significant residual or indirect burdens upon Web publishers. Most importantly, both credit card and age verification systems require an individual seeking to access material otherwise permissible to adults to reveal personal statistics. Because many adults will choose not to reveal these personal details, those otherwise frequently visited Web sites will experience "a loss of traffic." *Id.* at 491. This loss of traffic, in turn, would inflict "economic harm" upon the particular Web site, thus increasing the burden that COPA imposes. *Id.* ¶ 61.

Finally, the District Court considered whether voluntary parental blocking or filtering software was a less restrictive means by which to achieve the government's compelling objective of protecting minors from harmful material on the Web. The court found that "[s]uch technology may be downloaded and installed on a user's home computer at a price of approximately $40.00." *Id.* at 492 ¶ 65. The court, however, acknowledged that such software "is not perfect" as it is both over and under inclusive in the breadth of the material that it blocks and filters. *See id.* ¶ 66.[16]

[16] We question, however, the effectiveness of actions taken by a minor's parent to supervise or block harmful material by using filtering software. We are of the view that such actions do not constitute government action, and we do not consider this to be a lesser restrictive means for the government to achieve its compelling interest. *See also* n. 24 *supra*. *But see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000).

F. District Court's Conclusions of Law

Initially, the government moved the District Court to dismiss the ACLU's action insofar as the individuals and entities that it purported to represent were not in danger of prosecution under COPA and therefore lacked standing. In particular, the government asserted that the material placed on plaintiffs' Web sites was not "harmful to minors" and that each of the plaintiffs were not "engaged in the business" of posting such material for "commercial purposes." *See supra* note 13.

The District Court interpreted COPA to impose liability on those Web publishers who profited from Web sites that contained some, even though not all, material that was harmful to minors. *See Reno III*, 31 F. Supp.2d at 480. The court therefore concluded that the plaintiffs could reasonably fear prosecution because their Web sites contained material "that is sexual in nature." *Id.*

Having established plaintiffs' standing[17]—an analysis with which we agree—the District Court began its First Amendment analysis by stating that insofar as COPA prohibits Web publishers from posting material that is "harmful to minors," it constitutes a content-based restriction on speech that "is presumptively invalid and is subject to strict scrutiny." *Id.* at 493 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable Comm. of Calif. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989)) *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct.

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17 *See Reno III*, 31 F. Supp.2d at 479.

1878, 146 L.Ed.2d 865 (2000). Pursuant to this strict scrutiny analysis, the District Court held that COPA placed too large a burden on protected expression. In particular, the court found that the high economic costs that Web publishers would incur in implementing an age verification system would cause them to cease publishing such material, and further, that the difficulty in accurately shielding harmful material from minors would lead Web publishers to censor more material than necessary. *See id.* at 494-95. Moreover, the District Court believed that because of the need to use age verification systems, adults would be deterred from accessing these sites, and that the resulting loss of Web traffic would affect the Web publishers' abilities to continue providing such communications in the future.

The court then considered whether the government could establish that COPA was the least restrictive and most narrowly tailored means to achieve its compelling objective. *See Reno III*, 31 F. Supp.2d at 496. The government contends that COPA meets this test because COPA does not " 'ban . . . the distribution or display of material harmful to minors [but] simply requires the sellers of such material to recast their message so that they are not readily available to children.' "Appellant's Brief at 27 (quoting H.R. REP. No. 105-775 at 6 (1998)). The court concluded, however, that even if COPA were enforced, children would still be able to access numerous foreign Web sites containing harmful material; that some minors legitimately possess credit cards—thus defeating the effectiveness of this affirmative defense in restricting access by minors; that COPA prohibits a "sweeping category of form of content" instead of limiting its coverage to pictures, images and graphic image files—most often

utilized by the adult industry as "teasers" *Reno III*, 31 F. Supp.2d at 497; and that parental blocking and filtering technology would likely be as effective as COPA while imposing fewer constitutional burdens on free speech. Therefore, the District Court concluded that COPA was not the least restrictive means for the government to achieve its compelling objective of protecting minors from harmful material. *Id.* at 492. As a result, the court held that the ACLU had shown a substantial likelihood of succeeding on the merits in establishing COPA's unconstitutionality.

In concluding its analysis, the District Court held that losing First Amendment freedoms, even if only for a moment, constitutes irreparable harm. *See id.* (citing *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)). And, in balancing the interests at stake for issuing a preliminary injunction, the District Court concluded that the scale tipped in favor of the ACLU, as the government lacks an interest in enforcing an unconstitutional law. *See id.* (citing *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996)). Because the ACLU met its burden for a preliminary injunction, the District Court granted its petition.

II. ANALYSIS

In determining whether a preliminary injunction is warranted, we must consider:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (citing *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc)). We review a district court's grant of a preliminary injunction according to a three-part standard. Legal conclusions are reviewed de novo, findings of fact are reviewed for clear error, and the "ultimate decision to grant or deny the preliminary injunction" is reviewed for abuse of discretion. *See Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S. Ct. 1802, 143 L.Ed.2d 1007 (1999).

A. Reasonable probability of success on the merits

We begin our analysis by considering what, for this case, is the most significant prong of the preliminary injunction test—whether the ACLU met its burden of establishing a reasonable probability of succeeding on the merits in proving that COPA trenches upon the First Amendment to the United States Constitution. Initially, we note that the District Court correctly determined that as a content-based restriction on speech, COPA is "both presumptively invalid and subject to strict scrutiny analysis." *See Reno III*, 31 F. Supp.2d at 493. As in all areas of constitutional strict scrutiny jurisprudence, the government must establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech. *See, e.g., Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *Sable Comm of Calif. v. FCC*, 492

U.S. 115, 126, 109 S. Ct. 2829 (1989).[18] These principles have been emphasized again in the Supreme Court's most recent opinion, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000), where the Court, concerned with the "bleeding" of cable transmissions, held § 505 of the Telecommunications Act of 1996 unconstitutional as violative of the First Amendment.

It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards. *See Reno III*, 31 F. Supp.2d at 495 (citing

[18] The Supreme Court has recognized that each medium of expression may permit special justifications for regulation. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). For example, broadcast media, due to the history of extensive government regulation, its "invasive" nature, and the scarcity of available frequencies at its inception justified heightened regulation. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000). However, the Supreme Court has also recognized that these same elements, which justified heightened regulation of the broadcast medium, do not exist in cyberspace. *See Reno v. ACLU*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). The Internet has not been historically subject to regulation. Nor has the Internet suffered from a scarcity of available frequencies. *See id.* at 869-70, 117 S. Ct. 2329. Therefore, the Supreme Court held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this [cyberspace] medium." *Id.* at 870, 117 S. Ct. 2329.

Sable, 492 U.S. at 126, 109 S. Ct. 2829 (1989); *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). At issue is whether, in achieving this compelling objective, Congress has articulated a constitutionally permissible means to achieve its objective without curtailing the protected free speech rights of adults. *See Reno III*, 31 F. Supp.2d at 492 (citing *Sable*, 492 U.S. at 127, 109 S. Ct. 2829; *Butler v. Michigan*, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957)). As we have observed, the District Court found that it had not—holding that COPA was not likely to succeed in surviving strict scrutiny analysis.

We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute. Hence we base our opinion entirely on the basis of the likely unconstitutionality of this clause, even though the District Court relied on numerous other grounds.[19]

[19] As a result, we do not find it necessary to address the District Court's analysis of the definition of "commercial purposes"; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included

As previously noted, in passing COPA, Congress attempted to resolve all of the problems raised by the Supreme Court in striking down the CDA as unconstitutional. One concern noted by the Supreme Court was that, as a part of the wholly unprecedented broad coverage of the CDA, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. We are not persuaded that the Supreme Court's concern with respect to the "community standards" criterion has been sufficiently remedied by Congress in COPA.

Previously, in addressing the mailing of unsolicited sexually explicit material in violation of a California obscenity statute, the Supreme Court held that the fact-finder must determine whether "'the average person, applying contemporary community standards' would find the work taken as a whole, [to appeal] to the prurient interest." *Miller v. California*, 413 U.S. 15, 24,

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as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken "as a whole" should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic.

We recognize that in focusing on the "contemporary community standards" aspect of COPA we are affirming the District Court's ruling on a ground other than that emphasized by the District Court. *See PAAC v. Rizzo*, 502 F.2d 306, 308 n. 1 (1974).

93 S. Ct. 2607, 37 L.Ed.2d 419 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230, 92 S. Ct. 2245, 33 L.Ed.2d 312 (1972)). In response to the Supreme Court's criticism of the CDA, Congress incorporated into COPA this *Miller* test, explaining that in so doing COPA now "conforms to the standards identified in *Ginsberg*, as modified by the Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973)." H.R. REP. NO. 105-775 at 13 (1998); 47 U.S.C. § 231(e)(6)(A). Even in so doing, Congress remained cognizant of the fact that "the application of community standards in the context of the Web is controversial." H.R. REP. NO.. 107-775, at 28. Nevertheless, in defending the constitutionality of COPA's use of the *Miller* test, the government insists that "there is nothing dispositive about the fact that [in COPA] commercial distribution of such [harmful] materials occurs through an online, rather than a brick and mortar outlet." *See* Reply Brief at 18 n. 3.

Despite the government's assertion, "[e]ach medium of expression 'must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'" *Reno III*, 31 F. Supp.2d at 495 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975)). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at ——, 120 S. Ct. 1878, 1887, 146 L.Ed.2d 865, at _____ (2000). In considering "the unique factors that affect communication in the new and technology-laden medium of the Web," we are convinced that there are crucial differences between a "brick and mortar outlet" and the online Web that dramatically affect a First Amendment analysis. *Id.*

Unlike a "brick and mortar outlet" with a specific geographic locale, and unlike the voluntary physical mailing of material from one geographic location to another, as in Miller, the uncontroverted facts indicate that the Web is *not geographically constrained. See Reno III*, 31 F. Supp.2d at 482-92; *American Libraries*, 969 F. Supp. at 169 ("geography, however, is a virtually meaningless construct on the Internet"). Indeed, and of extreme significance, is the fact, as found by the District Court, that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. As soon as information is published on a Web site, it is accessible to all other Web visitors. *See American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp.2d at 483. Current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community." *Reno III*, 31 F. Supp.2d at 484. This key difference necessarily affects our analysis in attempting to define what contemporary community standards should or could mean in a medium without geographic boundaries.

In expressing its concern over the wholly unprecedented broad coverage of the CDA's scope, the Supreme Court has already noted that because of the peculiar geography-free nature of cyberspace, a "community standards" test would essentially require every Web communication to abide by the most restrictive community's standards. *See Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329. Similarly, to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material

that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

The government argues that subjecting Web publishers to varying community standards is not constitutionally problematic or, for that matter, unusual. The government notes that there are numerous cases in which the courts have already subjected the same conduct to varying community standards, depending on the community in which the conduct occurred. For example, the Supreme Court has stated that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the material [but that] does not render a federal statute unconstitutional because of the failure of the application of uniform national standards of obscenity." *Hamling v. United States*, 418 U.S. 87, 106, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974). Similarly, the government cites to the "dial-a-porn" cases in which the Supreme Court has held that even if the "audience is comprised of different communities with different local standards" the company providing the obscene material "ultimately bears the burden of complying with the prohibition on obscene messages" under each community's respective

standard. *Sable Comm. of California v. F.C.C.*, 492 U.S. 115, 125-26, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

These cases, however, are easily distinguished from the present case. In each of those cases, the defendants had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it. Therefore, the defendants could limit their exposure to liability by avoiding those communities with particularly restrictive standards, while continuing to provide the controversial material in more liberal-minded communities. For example, the pornographer in *Hamling* could have chosen not to mail unsolicited sexually explicit material to certain communities while continuing to mail them to others. Similarly, the telephone pornographers ("dial-a-porn") in *Sable* could have screened their incoming calls and then only accepted a call if its point of origination was from a community with standards of decency that were not offended by the content of their pornographic telephone messages.[20]

By contrast, Web publishers have no such comparable control. Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site. In fact, "an Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . com-

[20] The *Sable* court found that: "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law that may imposes such costs on a medium electing to provide these messages." *Sable* 492 U.S. at 125-26, 109 S. Ct. 2829.

munication[s] to different jurisdictions . . . The Internet user has no ability to bypass any particular state." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). As a result, unlike telephone or postal mail pornographers, Web publishers of material that may be harmful to minors must "comply with the regulation imposed by the State with the most stringent standard or [entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution." *Id.*

To minimize this distinction between Web publishers and all other forms of communication that contain material that is harmful to minors, the government cites to one Sixth Circuit case—presently the only case in which a court has applied a "community standards" test in the context of the electronic medium. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). The *Thomas* court determined that whether the material on the defendant's electronic bulletin board is harmful must be judged by the standards of each individual community wherein the disputed material was received, even if the standards in each of the recipient communities varied one from the next, and even if the material was acceptable in the community from which it was sent. *See id.* at 711. Despite the "electronic medium" in which electronic bulletin boards are found, *Thomas* is inapposite inasmuch as electronic bulletin boards, just as telephones, regular mail and other brick and mortar outlets, are very different creatures from that of the Web as a whole. *Thomas* itself recognized this difference, and by limiting its holding accordingly, completely undercuts the government's argument, stating explicitly that:

Defendants and Amicus Curiae appearing on their behalf argue that the computer technology used here requires a new definition of community, i.e., one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial. . . . Therefore, they contend . . . [bulletin board publishers] will be forced to censor their material so as not to run afoul of the standards of the community with the most restrictive standards. Defendants' First Amendment issue, however, is not implicated by the facts of this case. This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing. Access to the Defendants' [bulletin board] was limited. Membership was necessary and applications were submitted and screened before passwords were issued and materials were distributed. Thus, Defendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than in California . . . . If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability. . . . . Thus, under the facts of this case, there is no need for this court to adopt a new definition of "community' for use in obscenity prosecutions involving electronic bulletin boards. This court's decision is guided by one of the cardinal rules governing the federal courts, i.e., never reach constitutional questions not squarely presented by the facts of a case. *Id.* at 711-12.

Thus, it is clear that *Thomas* fails to support the government's position. Indeed, no federal court has yet ruled on whether the Web/Internet may be constitutionally regulated in light of differing community standards.

Our concern with COPA's adoption of *Miller*'s "contemporary community standards" test by which to determine whether material is harmful to minors is with respect to its overbreadth in the context of the Web medium. Because no technology *currently* exists by which Web publishers may avoid liability, such publishers would necessarily be compelled to abide by the "standards of the community most likely to be offended by the message" *Reno II*, 521 U.S. at 877-78, 117 S. Ct. 2329, even if the same material would not have been deemed harmful to minors in all other communities. Moreover, by restricting their publications to meet the more stringent standards of less liberal communities, adults whose constitutional rights permit them to view such materials would be unconstitutionally deprived of those rights. Thus, this result imposes an overreaching burden and restriction on constitutionally protected speech.[21]

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[21] Even if we were to overlook the unconstitutional overbreadth of the COPA "contemporary community standards" test and if COPA were to be deemed effective, it still would not eliminate much of the harmful material which a minor could access. For example, minors could still access harmful material published by non-commercial Web publishers, and by foreign Web publishers. Thus, for example, materials "harmful to minors" but generated in foreign communities with contemporary community standards far more liberal than those of any state in the United States may, nevertheless, remain available and be exposed to

We recognize that invalidating a statute because it is overbroad is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). As such, before concluding that a statute is unconstitutionally overbroad, we seek to determine if the statute is "'readily susceptible' to a narrowing construction that would make it constitutional . . . [because courts] will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers' Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975)). *See also Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992); *Shea*, 930 F. Supp. at 939.

Two possible ways to limit the interpretation of COPA are (a) assigning a narrow meaning to the language of the statute itself, or (b) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact. *See e.g. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985); *Shea*, 930 F. Supp. at 939. We therefore turn our attention to whether either limiting construction is feasible here.

The government, in attempting to make use of the first of these salvaging mechanisms, suggests that we should interpret narrowly the "contemporary community standards" language in COPA as an "adult" rather than as a "geographic" standard. The House

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children in the United States by means of the Web/Internet, despite COPA's restrictions.

Report itself suggests this construction to sidestep the potential constitutional problems raised by the Supreme Court in interpreting the CDA's use of a "community standards" phrase. Congress explained:

> The committee intends for the definition of material harmful to minors to parallel the Ginsberg and Miller definitions of obscenity and harmful to minors. . . . In essence, the Committee intends to adopt the "variable obscenity" standard for minors. The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an 'adult' standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors. . . . . Thus, the person posting the material is engaged in interstate commerce and is subjecting himself to the jurisdiction of all communities in a manner similar to the way obscenity laws apply today.

H.R. REP. NO. 105-775 at 28 (1998). Congress reiterated this very position in its amicus brief stating: "COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful to Minors test." Brief of Members of Congress as *Amici Curiae*, at 16.

Despite the government's effort to salvage this clause of COPA from unconstitutionality, we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors. To the contrary, it is significant to us that throughout case law, community standards have always been interpreted as a geographic standard without uniformity. *See, e.g., Ameri-*

can Libraries Ass'n v. Pataki, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997) ("Courts have long recognized, however, that there is no single 'prevailing community standard' in the United States. Thus, even were all 50 states to enact laws that were verbatim copies of the New York [*obscenity*] Act, Internet users would still be subject to discordant responsibilities.").

In fact, *Miller*, the very case from which the government derives its "community standards" concept, has made clear that community standards are to be construed in a localized geographic context. "People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller* 413 U.S. at 33, 93 S. Ct. 2607. Even more directly, the Supreme Court stated in *Miller* that "our nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation. . . . To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Id.* at 30, 93 S. Ct. 2607. We therefore conclude that the interpretation of "contemporary community standards" is not "readily susceptible" to a narrowing construction of "adult" rather than "geographic" standard.

With respect to the second salvaging mechanism, it is an "'elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct.

2794, 86 L.Ed.2d 394 (1985) (quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1880)). As a result, if it is possible for a court to identify a particular part of the statute that is unconstitutional, and by striking *only* that *language* the court could leave the remainder of the statute intact and within the intent of Congress, courts should do so. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85, 107 S. Ct. 1476, 94 L.Ed.2d 661 (1987).

Here, however, striking "contemporary community standards" from COPA is not likely to succeed in salvaging COPA's constitutionality as this standard is an integral part of the statute, permeating and influencing the whole of the statute. We see no means by which to excise those "unconstitutional" elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional). This is particularly so in a preliminary injunction context when we are convinced that the very test or standard that COPA has established to determine what is harmful to minors is more likely than not to be held unconstitutional. *See Brockett*, 472 U.S. at 504-05, 105 S. Ct. 2794.

Our foregoing discussion that under either approach —of narrowing construction or deleting an unconstitutional element—COPA is not "readily susceptible" to a construction that would make it constitutional. We agree with the Second Circuit that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555

(2d Cir. 1988). As regulation under existing technology is unreasonable here, we conclude that with respect to this first prong of our preliminary injunction analysis, it is more likely than not that COPA will be found unconstitutional on the merits.[22]

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[22] Although our concern here has been with the overbreadth of the "contemporary community standards" clause, we recognize that if we were to address that portion of COPA which speaks to communications made for commercial purposes, 47 U.S.C. § 231(e)(2)(A), the Supreme Court has taught that "[f]or the purposes of applying the overbreadth doctrine . . . it remains relevant to distinguish between commercial and noncommercial speech." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n. 7, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). For instance, it has declined to apply the overbreadth doctrine to statutes regulating commercial advertising:

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context . . . [T]here are "commonsense differences" between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced . . .

Bates v. State Bar of Arizona, 433 U.S. 350, 380-81, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) (citations omitted). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 n. 6, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'").

However, although COPA regulates the commercial content of the Web, it amounts to neither a restriction on commercial advertising, nor a regulation of activity occurring "in the ordinary commercial context." *Bates*, 433 U.S. at 380-81, 97 S. Ct. 2691. As we have noted, the Web is a new type of medium which allows the average person with relatively little capital investment to place content on it for a commercial purpose. The speech such Web sites

Our holding in no way ignores or questions the general applicability of the holding in *Miller* with respect to "contemporary community standards." We remain satisfied that *Miller*'s "community standards" test continues to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology. *Miller* itself was designed to address the *mailing* of unsolicited sexually explicit material in violation of California law, where a publisher *could* control the community receiving the publication. *Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications. *See Reno II*, 521 U.S. at 889, 117 S. Ct. 2329 (O'Connor, J., concurring in judgment in part and dissenting in part) (noting that the "twin

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provide is in far greater danger of being stifled by government regulation than the commercial advertising at issue in cases such as *Bates* and *Central Hudson Gas*.

As the Supreme Court has also made clear, the benefits gained by the challenged statute must also outweigh the burden imposed on commercial speech. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L.Ed.2d 161 (1999) (in regulating commercial speech, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). *See also Sable*, 492 U.S. at 127, 109 S. Ct. 2829. Therefore, there is no inconsistency between our position that COPA is overbroad, and the line of authority refusing to apply overbreadth analysis to certain types of commercial speech.

characteristics of geography and identity" differentiate the world of Ginsberg [and *Miller*] from that of the Internet.).

B. Irreparable Harm By Denial of Relief

The second prong of our preliminary injunction analysis requires us to consider "whether the movant will be irreparably harmed by denial of the relief." *Allegheny Energy, Inc. v. DQE, Inc.* 171 F.3d 153, 158 (3d Cir. 1999). Generally, "[i]n a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *Reno I*, 929 F. Supp. 824 at 866. This case is no exception.

If a preliminary injunction were not to issue, COPA-affected Web publishers would most assuredly suffer irreparable harm—the curtailment of their constitutionally protected right to free speech. As the Supreme Court has clearly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). We, therefore, conclude that this element of our preliminary injunction analysis has been satisfied.

C. Injury Outweighs Harm

The third prong of our preliminary injunction analysis requires us to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). We are convinced that in

balancing the parties' respective interests, COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction. We are also aware that without a preliminary injunction, Web publishers subject to COPA would immediately be required to censor constitutionally protected speech for adults, or incur substantial financial costs to implement COPA's affirmative defenses.[23] Therefore, we affirm the District Court's holding that plaintiffs sufficiently met their burden in establishing this third prong of the preliminary injunction analysis.

D. Public Interest

As the fourth and final element of our preliminary injunction analysis, we consider "whether granting the preliminary relief will be in the public interest." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). Curtailing constitutionally protected speech will not advance the public interest, and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Reno I*, 929 F. Supp. at 866. Having met this final element of our preliminary injunction analysis, the District Court properly granted the ACLU's petition for a preliminary injunction.

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[23] These costs with respect to Web publishers and to those who desire access to those Web sites were enumerated by the District Court in its findings of fact.

III. CONCLUSION

Due to current technological limitations, COPA—Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web—is more likely than not to be found unconstitutional as overbroad on the merits.[24] Because the ACLU has met its burden in establishing all four of the necessary elements to obtain a preliminary injunction, and the District Court properly exercised its discretion in issuing the preliminary injunction, we will affirm the District Court's order.

In so affirming, we approvingly reiterate the sentiments aptly noted by the District Court: "sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Reno III*, 31 F. Supp.2d at 498.[25] We also express our confidence and firm conviction that developing technology will soon render the "community standards" challenge moot, thereby making congressional regulation to protect minors from harmful material on the Web constitutionally practicable. Indeed, in the context of dealing with technology to prevent the "bleeding" of cable transmissions, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 at ——, 120 S. Ct. 1878, 1883, 146 L.Ed.2d 865 at _____ (2000) recognized, as do we, that "technology may one day provide another solution."

Therefore, we will affirm the District Court's order dated February 1, 1999, issuing a preliminary injunction.

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[24] Although much attention at the District Court level was focused on the availability, virtues and effectiveness of voluntary blocking or filtering software that can enable parents to limit the harmful material to which their children may otherwise be exposed, the parental hand should not be looked to as a substitute for a congressional mandate. *See also* n.16 supra.

[25] "When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles." Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 521 (2000).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. CIV. A. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

[Feb. 1, 1999]

MEMORANDUM

REED, District Judge.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Although there is no complete consensus on the issue, most courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered. Indeed, the First Amendment was designed to prevent the majority, through acts of

Congress, from silencing those who would express unpopular or unconventional views.

Despite the protection provided by the First Amendment, unconventional speakers are often limited in their ability to promote such speech in the marketplace by the costs or logistics of reaching the masses, hence, the adage that freedom of the press is limited to those who own one. In the medium of cyberspace, however, anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.

But with freedom come consequences. Many of the same characteristics which make cyberspace ideal for First Amendment expression—ease of participation and diversity of content and speakers—make it a potentially harmful media for children. A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web. For example, typing the word "dollhouse" or "toys" into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites. These Web sites offer "teasers," free sexually explicit images and animated graphic image files designed to entice a user to pay a fee to browse the whole site.

Intending to address the problem of children's access to these teasers, Congress passed the Child Online

Protection Act ("COPA"), which was to go into effect on November 29, 1998. On October 22, 1998, the plaintiffs, including, among others, Web site operators and content providers, filed this lawsuit challenging the constitutionality of COPA under the First and Fifth Amendments and seeking injunctive relief from its enforcement. Two diametric interests—the constitutional right of freedom of speech and the interest of Congress, and indeed society, in protecting children from harmful materials—are in tension in this lawsuit.

This is not the first attempt of Congress to regulate content on the Internet. Congress passed the Communications Decency Act of 1996 ("CDA") which purported to regulate the access of minors to "indecent" and "patently offensive" speech on the Internet. The CDA was struck down by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno I*") as violative of the First Amendment. COPA represents congressional efforts to remedy the constitutional defects in the CDA.

Plaintiffs attack COPA on several grounds: (1) that it is invalid on its face and as applied to them under the First Amendment for burdening speech that is constitutionally protected for adults, (2) that it is invalid on its face for violating the First Amendment rights of minors, and (3) that it is unconstitutionally vague under the First and Fifth Amendments. The parties presented evidence and argument on the motion of plaintiffs for a temporary restraining order on November 19, 1998. This Court entered a temporary restraining order on November 20, 1998, enjoining the enforcement of COPA until December 4, 1998. (Document Nos. 29 and 30). The defendant agreed to extend the duration

of the TRO through February 1, 1999. (Document No. 34). The parties conducted accelerated discovery thereafter. While the parties and the Court considered consolidating the preliminary injunction hearing with a trial on the merits, the Court, upon due consideration of the arguments of the parties, ultimately decided that it would proceed only on the motion for preliminary injunction. (Document No. 39). There necessarily remains a period for completion of discovery and preparation before a trial on the merits.

The defendant filed a motion to dismiss the entire action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing in addition to her arguments in response to the motion for preliminary injunction. (Document No. 50). The plaintiffs filed a response to the motion to dismiss (Document No. 69), to which the defendant filed a reply. (Document No. 81).

On the motion of plaintiffs for preliminary injunction, the Court heard five days of testimony and one day of argument on January 20, 1999 through January 27, 1999. In addition, the parties submitted briefs, expert reports, declarations from many of the named plaintiffs, designated portions of deposition transcripts, and documentary evidence for the Court's review. Based on this evidence and for the reasons that follow, the motion to dismiss will be denied and the motion for a preliminary injunction will be granted.

I. *The Child Online Protection Act*

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.—Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.—In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
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> (3) CIVIL PENALTY.—In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. § 231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

> person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231(c) provides that:

(c) AFFIRMATIVE DEFENSE.-

(1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

The disclosure of information collected in implementing the affirmative defenses is restricted in § 231(d):

(d) PRIVACYPROTECTION REQUIREMENTS.—

(1) DISCLOSURE OF INFORMATION LIMITED.-A person making a communication described in subsection (a)—

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) EXCEPTIONS.-A person making a communication described in subsection (a) may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

II. *Arguments of the Parties*

The arguments of the parties are plentiful and will be only summarized here for purposes of the motion for a preliminary injunction. Plaintiffs argue that COPA is unconstitutional on its face and as applied to them because the regulation of speech that is "harmful to minors" burdens or threatens a large amount of speech that is protected as to adults.[1] According to the plaintiffs, the fact that COPA is vague, overbroad, and a direct ban on speech that provides only affirmative defenses to prosecution contributes to the burden COPA places on speech. The plaintiffs argue that the affirmative defenses provided in COPA do not alleviate the burden on speech because their implementation imposes an economic and technological burden on speakers which results in loss of anonymity to users and consequently loss of users to its Web sites. The plaintiffs contend that the defendant cannot justify the burden on speech by showing that COPA is narrowly tailored to a compelling government interest or the least restrictive means to accomplish its ends. Alternatively, plaintiffs frame their facial attack to the statute as an overbreadth challenge, arguing that speech will be chilled on the Web because the statute covers more speech than it was intended to cover, even

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1 The plaintiffs are not challenging the provision of COPA that pertains to speech that is obscene. Thus, the enforcement of that provision of COPA is unaffected by this Memorandum and Order. Obscenity and child pornography have been the subject of other separate criminal statutes for many years. These laws are as well not implicated in this proceeding.

if it can be constitutionally applied to a narrow class of speakers. The plaintiffs also challenge COPA as being unconstitutionally vague under the First and Fifth Amendments and facially unconstitutional as to speech protected for minors.

Defendant argues that COPA passes constitutional muster because it is narrowly tailored to the government's compelling interest in protecting minors from harmful materials. The defendant argues that the statute does not inhibit the ability of adults to access such speech or the ability of commercial purveyors of materials that are harmful to minors to make such speech available to adults. The defendant points to the presence of affirmative defenses in the statute as a technologically and economically feasible method for speakers on the Web to restrict the access of minors to harmful materials. As to the plaintiffs' argument that COPA is overbroad, the defendant argues that the definition of "harmful to minors" material does not apply to any of the material on the plaintiffs' Web sites, and that the statute only targets commercial pornographers, those who distribute harmful to minors material "as a regular course" of their business. The defendant contends that plaintiffs cannot succeed on their motion for a preliminary injunction because they cannot show a likelihood of success on their claims and that their claim of irreparable harm is merely speculative.

Some of the defendant's substantive arguments are conceptually intertwined with her arguments in support of the pending motion to dismiss the complaint on the basis that the plaintiffs lack standing to attack the statute. The motion to dismiss will serve as a starting point for the Court's analysis.

III. *Resolution of Defendant's Motion to Dismiss*

Among other things, the "irreducible constitutional minimum" of standing requires that the plaintiffs allege that they have suffered or imminently will suffer an injury. It is well established that a credible threat of present or future criminal prosecution will confer standing. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that the Court was "unconcerned by the pre-enforcement nature of th[e] suit" and holding that the injury-in-fact requirement was met, in part, because "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) ("It is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Doe v. Bolton*, 410 U.S. 179, 188-89, 93 S. Ct. 739, 35 L.Ed.2d 201 (1973). The rationale underlying this rule is that a credible threat of present or future prosecution is itself an injury that is sufficient to confer standing, even if there is no history of past enforcement. *See Bolton*, 410 U.S. at 188, 93 S. Ct. 739. In part, this rationale is based on a recognition that a speaker who fears prosecution may engage in self-censorship, which is itself an injury.

"The standard-encapsulated in the phrase 'credible threat of prosecution'-is quite forgiving." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("*NHRLPAC*"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979). After

analyzing both Supreme Court precedent and federal appellate court decisions, the *NHRLPAC* Court concluded that "the preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, the court will assume a credible threat of prosecution in the absence of compelling contrary evidence." 99 F.3d at 15; *see also Babbitt*, 442 U.S. at 301-02, 99 S. Ct. 2301; *Doe*, 410 U.S. at 188, 93 S. Ct. 739; *American Booksellers*, 484 U.S. at 392-93, 108 S. Ct. 636; *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (even though no present danger of enforcement existed, a credible threat of prosecution existed because nothing would "prevent the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners"); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (holding that when a state statute "chills the exercise of First Amendment rights, standing exists even though the official charged with enforcement responsibilities has not taken any enforcement action against the plaintiffs and does not presently intend to take any such action").

The gravamen of the motion of defendant is that plaintiffs' fear of prosecution is wholly speculative and, therefore, not a credible threat sufficient to confer standing. The defendant argues that the plaintiffs lack standing because the material on their Web site is not "harmful to minors," and the plaintiffs are not "engaged in the business" of distributing harmful to minors materials under the statute. The defendant contends that the Court should narrowly construe COPA to apply to

those engaged in the business of commercial pornography, which does not include any of the plaintiffs.

There is nothing in the text of the COPA, however, that limits its applicability to so-called commercial pornographers only; indeed, the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes "that *includes any material* that is harmful to minors," and defines a speaker that is engaged in the business as one who makes a communication "that *includes any material* that is harmful to minors . . . as a regular course of such person's trade or business (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." (emphasis added). Because COPA applies to communications which include, but are not necessarily wholly comprised of material that is harmful to minors, it logically follows that it would apply to any Web site that contains only some harmful to minors material.

Based on the allegations of the complaint and the evidence and testimony presented to the Court, it appears that all of the individual plaintiffs except Electronic Privacy Information Center have some content on their Web sites or post some content on other sites that is sexual in nature.[2] All of the organizational

[2] Plaintiff Electronic Privacy Information Center ("EPIC") is a nonprofit education organization which studies civil liberties and privacy issues on the Internet. Thus, EPIC claims that it will suffer imminent injury as a user of the Web because it fears that it will have to incur costs or its staff will lose anonymity in accessing content on the Web and that content providers, to comply with COPA, will remove materials from their Web sites that it has been able to access and study in the past. (Complaint ¶¶ 137-141). The First Amendment protects the right to "receive information and ideas." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (internal quote omitted); *see also Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 7, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (noting that the First Amendment protects the public's interest in receiving information); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1254-55 (3d Cir. 1992) (same).

plaintiffs have members who have some content on their Web sites or who post some content on other sites that is sexual in nature.[3] The plaintiffs contend that such sexual material could be considered "harmful to minors" by some communities.

The plaintiffs offer an interpretation of the statute which is not unreasonable, and if their interpretation of COPA's definition of "harmful to minors" and its application to their content is correct, they could potentially face prosecution for that content on their Web sites. *Vermont Right to Life Comm. Inc. v. Sorrell*, 19 F. Supp.2d 204, 210 (D. Vt. 1998) (plaintiffs had standing to challenge campaign finance statute, even though State argued that the plaintiffs were and had been

[3] Furthermore, the four organizations who are bringing suit on behalf of their members—the American Civil Liberties Union, the American Booksellers Foundation for Free Expression, the Electronic Frontier Foundation and the Internet Content Coalition—have averred facts sufficient to support their standing to facially challenge the statute. *See, e.g., Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). In each case, members of their respective organizations would have standing in their own right, the interest each organization seeks serves to protect is germane to its purpose and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.*

complying with disclosure requirements and that internal group mailings or an isolated distribution of flyers at a county fair are "a far cry from the mass media activities contemplated by the legislature" because the statute on its face could be applied to the activities of the plaintiffs). Moreover, in the First Amendment context, courts recognize that litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *American Booksellers*, 484 U.S. at 393, 108 S. Ct. 636 (internal quotation and citation omitted). This Court concludes that the plaintiffs have articulated a credible threat of prosecution or shown that they will imminently suffer an injury sufficient to establish their standing to bring this lawsuit. Accordingly, the motion to dismiss will be denied.

IV. *Standard for a Preliminary Injunction*

To obtain a preliminary injunction, the plaintiffs must prove: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the preliminary injunction issues than to the plaintiffs if the preliminary injunction does not issue; and (4) that the public interest, if any, weighs in favor of plaintiffs. *See Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998).

V. *Findings of Fact*

Based on all the evidence admitted at the preliminary injunction hearing, the Court makes the following findings of fact.[4]

The parties submitted a Joint Stipulation of Uncontested Facts at the preliminary injunction hearing. (Joint Exhibit 3). Findings of fact numbered 1 through 20 and other findings as indicated are taken from the Joint Stipulation to provide background.

A. *The Internet and the World Wide Web*

0. The Internet is a giant network that interconnects innumerable smaller groups of linked computer networks: a network of networks. (Joint Exhibit 3 ¶ 1).

1. The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. However, it is indisputable that the Internet has experienced extraordinary growth in the past few years. In 1981, fewer than 300 com-

[4] The final adjudication of this case will not occur until after a trial on the merits, and thus, the parties may present further evidence at that trial. The findings of fact entered today, unless the result of a stipulation of the parties or based upon substantially identical testimony by witnesses for both sides, are characterized by the Court unconventionally as "testimony" or "evidence presented" so that the Court can explain the evidentiary basis for this Court's legal conclusion that the plaintiffs have met their burden under Federal Rule of Civil Procedure 65 to establish their right to the injunction they seek. Thus, these provisional findings will govern the case until conclusive findings of fact on the merits of the case are entered after the trial.

puters were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, however, over 1,000,000 computers were linked. The number of host computers has more than tripled from approximately 9.4 million hosts in January 1996 to more than 36.7 million hosts in July 1998. Approximately 70.2 million people of all ages use the Internet in the United States alone. (Joint Exhibit 3 ¶ 3).

2. Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions; some are owned by non-profit organizations; and some are privately owned. The resulting whole is a decentralized, global medium of communications—or "cyberspace"—that links individuals, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of individuals interested in a particular subject, or to the world as a whole. (Joint Exhibit 3 ¶ 4).

3. The content on the Internet is as diverse as human thought. The Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet often are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and

magazines. Creation of a Web site can range in cost from a thousand to tens of thousands of dollars, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as America Online allow subscribers to create a limited number of Web pages as a part of their subscription to AOL services. Any Internet user can communicate by posting a message to one of the thousands of available newsgroups and bulletin boards or by creating one of their own or by engaging in an on-line "chat", and thereby potentially reach an audience worldwide that shares an interest in a particular topic. (Joint Exhibit 3 ¶ 12).

4. Individuals can access the Internet through commercial and non-commercial "Internet service providers" of ISPs that typically offer modem access to a computer or computer network linked to the Internet. Many such providers are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. (Joint Exhibit 3 ¶ 18).

5. Another common way that individuals can access the Internet is through one of the major national commercial "online services" such as America Online or the Microsoft Network. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to

the extensive content available within each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services have millions of individual subscribers across the United States. (Joint Exhibit 3 ¶ 19).

6. In addition to ISPs, individuals may be able to access the Internet through schools, employers, libraries, and community networks. (Joint Exhibit 3 ¶¶ 14-17).

7. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network, utilizing a number of different Internet "protocols." These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

(1) one-to-one messaging (such as "e-mail"),

(2) one-to-many messaging (such as "listserv" or "mail exploders"),

(3) distributed message databases (such as "USENET newsgroups"),

(4) real time communication (such as "Internet Relay Chat"),

(5) real time remote computer utilization (such as "telnet"), and

(6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (i.e., pictures), and moving video images. (Joint Exhibit 3 ¶ 22).

8. When persons communicate solely via e-mail, they utilize a protocol known as SMTP (for simple mail transfer protocol). Similarly, persons may chat using the Internet Relay Chat protocol, or may post messages on "Usenet" news groups using a protocol referred to as NNTP. The communications listed above in categories (1) through (5) do not involve communicating by means of "HTTP" or hypertext transfer protocol, which is the protocol effected by COPA. (Joint Exhibit 3 ¶ 23).

9. Web-based chat rooms, e-mail, and newsgroups utilizing HTTP or hyper-text transfer protocol are interactive forms of communication, providing the user with the opportunity both to speak and to listen. (Joint Exhibit 3 ¶ 24).

10. The primary method of remote information retrieval today is the World Wide Web. (Joint Exhibit 3 ¶ 25).

11. The World Wide Web, or the "Web," uses a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text,

images, sound, animation and moving video stored in many other formats. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, an individual can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow individuals to locate and efficiently view related information even if the information is stored on numerous computers all around the world. (Joint Exhibit 3 ¶ 26).

12. The World Wide Web was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge. (Joint Exhibit 3 ¶ 27).

13. Many organizations now have "home pages" on the Web. These are documents that provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization. (Joint Exhibit 3 ¶ 30).

14. Links may also take the user from the original Web site to another Web site on another computer con-

nected to the Internet. The ability to link from one computer to another, from one document to another across the Internet regardless of its status or physical location, is what makes the Web unique. (Joint Exhibit 3 ¶ 31).

15. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running Web server software. The computer can be as simple as a small personal computer costing less than $ 1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself. (Joint Exhibit 3 ¶ 32).

16. A variety of systems have developed that allow users of the Web to search for particular information among all of the public sites that are part of the Web. Services such as Yahoo, Excite!, Altavista, Webcrawler, Infoseek, and Lycos are all services known as "search engines" or directories that allow users to search for Web sites that contain certain categories of information, or to search for key words.

17. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be

blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point. (Joint Exhibit 3 ¶ 37).

18. Once a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community. Unlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience. Because the Internet is a network of networks, any network connected to the Internet has the capacity to send and receive information to any other network. (Joint Exhibit 3 ¶ 41).

19. Sexually explicit material exists on the Internet. Such material includes text, pictures, audio and video images, extends from the modestly titillating to the hardest core. Some Web sites display for free what appear to be still or moving images of a sexually explicit nature. Sexually explicit materials exist on Web pages and on Web-based and non-Web based interactive fora. It exists on sites based in the United States and sites based outside the United States. (Joint Exhibit 3 ¶ 43).

20. There was no evidence in the record regarding the number of Web sites which are posted within the United States. However, based on a statistic from July of 1998 on the percentage of Internet hosts that originate in the United States, Dr. Donna Hoffman estimated that 60% of all content originates in the United States and 40% originates outside the United States. (Hoffman Testimony).

B. *The Speech Provided by the Plaintiffs*

21. The plaintiffs represent a broad range of individuals, entities, and organizations suing on behalf of their members, who are speakers, content providers, and ordinary users on the Web. Some of the plaintiffs post, read, and respond to content including, *inter alia*, resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines. (Plaintiffs' Declarations; Testimony of Talbot, Laurila, Barr, Rielly, and Tepper).

22. Internet users of all ages access content provided by the plaintiffs over the Web. At least some of the plaintiffs provide interactive fora such as Web-based electronic mail (email), Web-based chat, and Web-based discussion groups. Content providers and Web site operators who offer interactive fora, including some of the plaintiffs, usually select the topic or topics that will be interactively "discussed" by users through reading and posting content. (Plaintiffs' Declarations; Talbot Testimony; Rielly Testimony).

23. The vast majority of information on the plaintiffs' Web sites, as on the Web in general, is provided to users for free. (Plaintiffs' Declarations; Hoffman Testimony).

24. The plaintiffs are a diverse group of speakers, which was illustrated by the live testimony and

declarations that were submitted to the Court.[5] Christopher Barr, the vice president and editor-in-chief of CNET, testified that CNET's Web site provides news on a variety of topics which is available to users for free. CNET is supported by advertising that is displayed on its Web page. Barr testified that while he did not think that any material on CNET was harmful to minors, CNET feared prosecution under COPA for materials of a sexual nature on its Web site, particularly links provided in articles on the site to other sites on the Web and materials that may be downloaded for free by a user from the site. Barr testified that articles on the site in the past have linked to Playboy's Web site, and that a Kama Sutra screen saver, which includes forty drawings of people engaged in sexual contact, can be downloaded onto a user's computer. Barr testified that while CNET had not yet developed a policy regarding what the site would do to comply with COPA or where it

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[5] The Court considered live testimony and declarations of the plaintiffs which was submitted at both the preliminary injunction hearing and the temporary restraining order hearing. Declarations were submitted by Dr. Jeffrey Scott Levy of OBGYN.net; Nikki Douglas of RiotGrrl; Charles Tarver of BlackStripe; Nadine Strossen, member of the ACLU; Mark Segal of Philadelphia Gay News; Jon E. Noring of the Electronic Frontier Foundation (EFF); Marc Rotenberg of the Electronic Privacy Information Center; John William Boushka of EFF; David Bunnell, member of the ACLU; Lawrence Ferlinghetti of City Lights Bookstore and member of the ACLU; Richard P. Groman of West Stock; Miriam Sontz of Powell's Bookstore; Christopher Finan of the American Booksellers for Free Expression; Adam K. Glickman of Addazi, Inc. d/b/a Condomania; Ernest Johnson of ArtNet Worldwide Corporation, Roberta Speyer of OBGYN.net, Barry Steinhardt of EFF; and Patricia Nell Warren, a member of the ACLU.

would place screening devices, if at all, he stated that CNET would probably opt to self-censor the content of the site. (Barr Testimony).

25. Mitchell Steven Tepper, a member of the ACLU, is owner and operator of the Sexual Health Network, a Web site that he runs out of his home in Connecticut. The mission of his Web site is to provide easy access to information about sexuality geared toward individuals with disabilities. In addition to content which Tepper provides on the site, he also offers interactive components, including a bulletin board, where users may post comments, and a chat room. While any user can access the content on his site for free, Tepper is trying to make a profit from the site through advertising, but as yet has been unsuccessful. Tepper testified that Sexual Health Network fears prosecution under COPA based on the content of this site, which is almost exclusively sexual in nature and which contains, for example, information on sexual surrogacy as a form of sexual therapy and advice on how a large man and a small women should position themselves comfortably for intercourse. Tepper expressed concern that because of the sexual nature of his Web site, implementing one of the affirmative defenses in COPA on his Web site would have the effect of driving viewers away from his site because the users would not want to disclose personal information that reveals their identity in connection with his site. Tepper also testified that he believed that utilizing a third party age verification service would reduce the amount of traffic on his site because of the stigma and costs to the user associated with such services. (Tepper Testimony).

26. Thomas P. Rielly is the founder and chairman of PlanetOut, a Web site directed to developing an online community for gay, lesbian, bisexual, and transgendered people. PlanetOut's primary revenue comes from advertising on the site. Rielly testified that the Internet is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reactions of others because it allows closeted people access to this information while preserving their anonymity. PlanetOut provides a member form for users who would like to register in order to receive free benefits, but it does not require membership to access its site. Rielly estimated that less than 10% of the users to his site have registered, and PlanetOut does not verify the registration information provided by the user. The site includes a bulletin board, on which users may post and read messages, and chat rooms. The chat rooms are open 24 hours a day, during which they are monitored by a person for some of the time. Rielly testified that it would be impracticable to monitor all the chat on the site, and that there is no way to edit the content of chat before it is posted. (Rielly Testimony). PlanetOut contains some content of a sexual nature, including chat profiles of users, at least one of which included a photograph of a male with exposed genitals, and Internet radio shows with "Dr. Ruthless" on topics such as anal sex and masturbation. (Plaintiffs' Exs. 75, 76). Other areas of PlanetOut's site are not sexual in nature. Rielly testified that he predicted that traffic to his site would drop off if he were to require credit card or other age verification on PlanetOut; to support this prediction, he noted that the traffic to a competitor's site which had placed

its entire content behind a credit card wall and charged users $10 per month only grew to 10,000 total users. While PlanetOut currently cannot process credit cards on its site, it plans to develop its ability to conduct direct commercial transactions over the Web in the future. (Rielly Testimony).

C. *Commercial Activity on the Web*

27. E-commerce, or commercial transactions which are conducted online, is rapidly increasing. (Defendant's Ex. 188). Hoffman testified that there are 3.5 million Web sites globally on the Web, and approximately one third of those sites are commercial, that is Web sites that intend to make a profit. By the year 2003, it is estimated that the total revenues from the Web, including revenues from ISPs, business to business commerce, and business to consumer commerce, will reach $ 1.4 to $ 3 trillion. (Hoffman Testimony). There is no doubt that growth on the Web is explosive.

28. There are many reasons that may explain such expansive growth. For example, the Web is attractive to businesses because there are low barriers to entry as compared to other forms of commerce and the Web offers a global market or audience of all ages. The Web is attractive to consumers of all ages because a wide array of products and services are offered in an environment which attempts to provide those consumers with "full information." (Hoffman Testimony).

29. Despite the explosive growth and popularity on the Web, not all companies who operate Web sites are making money online. (Hoffman Testimony).

30. Hoffman testified that there are five general business models operating on the Web: (1) the Internet presence model, which involves no direct sales or advertising but is used by a business to raise customer awareness of the name and products of the Web site operator, (2) the advertiser supported or sponsored model, in which nothing is for sale, content is provided for free, and advertising on the site is the source of all revenue, (3) the fee based or subscription model in which users are charged a fee before accessing content, (4) the efficiency or effective gains model, by which a company uses the Web to decrease operating costs, and (5) the online storefront, in which a consumer buys a product or service directly over the Web. (Hoffman Testimony).

31. Dr. Hoffman testified that the most popular business model is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web. The fee based or subscription model is the least popular on the Web, although there are some successful examples of this model, such as the *Wall Street Journal* Web site. It is possible for a Web site to adopt a business model that is a hybrid of these five models. (Hoffman Testimony).

32. As online storefront models and general commercialization on the Web proliferates, the use of credit cards online and the requirement that users complete fill-out forms or register with a site will increase. (Hoffman Testimony).

33. The plaintiffs employ a variety of different business models. Some of the plaintiffs receive income from

the operation of their sites by selling advertising on their Web sites. Some of the plaintiffs charge other Internet speakers, such as fine artists, fine art galleries, or audio or video content creators, to post relevant content on their Web sites. Some of the plaintiffs sell goods over their Web sites, ranging from millions of books, to condoms and other sexual health devices, to books that they authored themselves. Some of the plaintiffs generate revenue by combining these business models. (Plaintiffs' Declarations; Testimony of Barr, Rielly, Tepper, Talbot, Laurila).

34. Dr. Hoffman testified that investors evaluate an e-business by the number of customers they believe the Web site is able to attract and retain over time, or "traffic." She believes that traffic is the most critical factor for determining success or potential for success on a Web site. The best way to stimulate user traffic on a Web site is to offer some content for free to users. Thus, virtually all Web sites offer at least some free content. (Hoffman Testimony).

35. Dr. Hoffman testified that another factor affecting traffic to a Web site is "flow." Interactivity increases a users interest level on the Web, which in turn results in return visits to the Web by users. "Flow" describes an online experience in which the user is completely engaged and focused while browsing or surfing the Web, has a sense of control over the experience, and has a proper mix of skills and challenges. Because return users equal more traffic to Web sites, facilitating a user's flow experience is related to a Web site's commercial

success. There are many factors that could disrupt a user's flow, including registration screens, broken links on a site, or poor site design. (Hoffman Testimony and Expert Report).

36. Dr. Hoffman observed in her testimony that in general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase. (Hoffman Testimony). Some Web sites that have required registration or a payment of a fee before granting access to a user to the site have not been successful, such as HotWired and Idea Market. Other Web sites that require a credit card to make a purchase have been successful in obtaining such information from users, such as Amazon.com. (Hoffman Testimony). Through studies that she has conducted and her observations of consumer behavior online, Hoffman concluded that consumers on the Web do not like the invasion of privacy from entering personal information, that their willingness to reveal personal information to a Web site is connected to the degree of trust the user has of the Web site, and that usually users will only reveal credit card information at the time they want to purchase a product or service. (Hoffman Testimony).

D. *Burden of Implementing the Affirmative Defenses Provided in COPA*

37. COPA provides three affirmative defenses that speakers may utilize to avoid prosecution for communicating harmful to minors materials: (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number, (2) accepting a digital certificate that verifies age, or (3) any other reasonable measures that are feasible under available technology. The parties' expert witnesses agree that at this time, while it is technologically possible, there is no certificate authority that will issue a digital certificate that verifies a user's age. (Farmer Testimony; Olsen Testimony). The plaintiffs presented testimony that there are no other reasonable alternatives that are technologically feasible at this time to verify age online. (Farmer Testimony). The defendant did not present evidence to the contrary.

38. It appears that the parties agree that the technology required to implement credit card authorization and adult access codes on a Web site is currently available and used on the Web. (Olsen Testimony; Farmer Testimony).

39. Depending on (1) the amount of content on a Web site, (2) the amount of that content that could be considered "harmful to minors," (3) the degree to which a Web site currently is organized into files and directories, (4) the degree to which "harmful to minors" content currently is segregated into a particular file or directory on the Web site, and (5) the level of expertise of the Web site operator, the technological requirements for implementing the affirmative defenses of credit card verification or accepting adult access codes or PINs ranges in the testimony of the parties from trivial (Olsen Testimony) to substantial (Farmer Testimony). The specific technological requirements of and costs associated with both affirmative defenses are detailed below.

1. *Technological Requirements and Out-of-Pocket Costs of Implementing Credit Cards*

40. To obtain credit card verification from users before granting access to harmful to minors materials, a Web site would need to construct a credit card screen in front of such materials. (Farmer Testimony). It is not disputed that a credit card or age verification screen can be placed at any point on a Web site: on the last page, or in front of an area of the site, or on select pages throughout the site, or at the beginning of the site on the home page. (Farmer Testimony; Tepper Testimony).

41. The parties agree that to implement the verification of credit card numbers, a Web site would need to undertake several steps, including (1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit cards numbers or passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers. (Olsen Testimony; Farmer Testimony).

42. The evidence shows that the cost of credit card verification services range from a start-up cost of approximately $300, plus per transaction fees, for a service that does not automatically verify or authorize the credit card numbers on the site to thousands of dollars in start-up costs, plus per transaction fees, to set up online credit card verification. (Tepper Testimony; Farmer Testimony).

43. Alternatively, a Web site could retain the services of a third party to provide online management of the verification of credit cards, but the Web site would incur costs for such services. (Olsen Testimony).

44. The parties agree that if a Web site is using an ISP that does not support credit card verification or CGI scripts, a Web site may need to transfer the content to another ISP or its own server. (Farmer Testimony; Olsen Testimony). The plaintiffs proffer that a secure server which supports credit card verification may cost a few thousand dollars. (Farmer Testimony).

45. There is no dispute that there are two types of credit card transactions that occur over the Internet: (1) an "authorize only" transaction (which determines whether the credit card number is valid and can be used to make a purchase), and (2) a "funds capture" transaction (which charges a particular amount to the user's credit card for a product or service). A fee is charged to the content provider every time a credit card number is authorized; such transaction fees would be approximately $.15 to $.25 per transaction. (Farmer Testimony; Olsen Testimony). Such authorization is not indicated on the credit card holder's monthly statement. (Olsen Testimony; Farmer Testimony). However, it is not clear from the conflicting testimony presented at the preliminary injunction hearing whether credit card verification services or clearinghouses will authorize or verify a credit card number in the absence of a subsequent funds capture transaction. (Farmer Testimony; Olsen Testimony).

46. The parties' experts agree that to avoid incurring the costs of authenticating a credit card number every time a user wants to access harmful to minors content behind the screen, a Web site operator could maintain a database of credit card numbers provided by previous users to the site, enabling the credit card number of a repeat user to be verified through the database. Thus, a Web site would only incur the cost of authorization one time per year for each new user to the screened content. (Farmer Testimony; Olsen Testimony). A content provider could also provide users with a password once their credit card has been authorized and store the valid passwords in a database; to return to a screened portion of the site, a return user would enter her password. A Web site could store encrypted credit card numbers or passwords on the site to reduce security risks associated with storing such information online. (Farmer Testimony; Olsen Testimony). Creating and maintaining such a database would impose some technological burdens and economic costs on a content provider, but a simple database could be constructed without much expense. (Farmer Testimony, Olsen Testimony).

48. The plaintiffs presented testimony that a minor may legitimately possess a valid credit or debit card. (Farmer Testimony). Of course, a minor may obtain the permission of her parents to use a parent's credit card as well. The defendant presented no evidence to the contrary.

2. Technological Requirements and Costs Associated with Adult Access Codes or PINs

48. The knowledgeable witnesses for the parties agree that there are approximately twenty-five services on the Web which will provide adult access codes or personal identification numbers. Adult access codes and adult personal identification numbers (PINs) are passwords that allow a user to access either an entire site or a restricted area of a Web site that accepts that particular access code or PIN. (Alsarraf Testimony, Farmer Testimony).

49. Laith Alsarraf, the president and CEO of Cybernet Ventures, testified on behalf of the defendant at the preliminary injunction hearing regarding the adult verification service, Adult Check, provided by his company. Once an Adult Check screen is inserted at some point into a Web site, that portion of the Web site is blocked to everyone unless they possess a valid Adult Check PIN. A Web site operator can sign up for free with Adult Check to accept Adult Check PINs, and a Web site operator can earn commissions of up to 50% to 60% of the fees generated by users who sign up with Adult Check to view screened content on the site. Adult Check provides the Web site operator with a script, free of charge, which can be placed at any point on the Web site where the content provider wishes to block access to minors. (Alsarraf Testimony).

50. The parties do not dispute that a user who comes across an Adult Check screen on a Web site may click on the link to the Adult Check site and immediately apply for an Adult Check PIN online.

(Alsarraf Testimony). Technically, almost all Web sites can link to such a third party, and the link may be placed anywhere on the Web site. (Farmer Testimony).

51. A user may obtain an Adult Check PIN for $16.95 per year. Adult Check accepts payment by credit card online, or a user may elect to fax or mail an application and a check and a copy of a passport or driver's license to Adult Check. (Alsarraf Testimony).

52. According to Alsarraf, approximately three million users possess a valid Adult Check PIN. The number of Web sites currently using Adult Check is approximately 46,000. Adult Check provides a list of links to other sites utilizing Adult Check PINs on its Web site. The vast majority of these links are to adult entertainment sites. (Alsarraf Testimony).

53. Alsarraf explained that Adult Check utilizes mechanisms whereby it attempts to track fraudulent use of the Adult Check PINs. If Adult Check determines that a PIN is being used fraudulently, that PIN is immediately invalidated. In addition, Adult Check offers free tools to Web sites to prevent a user from bookmarking a page containing harmful to minors material on a Web site and later returning to that page without first passing through the Adult Check screen. A Web site would have to implement such tools to prevent a user from attempting such an end-run around the screen. (Alsarraf Testimony). The Court infers that similar tools should be technically available to

other Web sites which have implemented screening by other methods, such as credit cards.

3. *Reorganizing a Web Site to Segregate Harmful to Minors Materials*

54. It appears clear to all the parties that to place potentially harmful to minors materials behind credit card or adult verification screens, some reorganization of the Web site would be required. (Farmer Testimony; Olsen Testimony). To do this, a content provider could reorganize the files in the Web site's directory, which is a place on the site which can hold such files, to disallow files containing material that is harmful to minors from being served to a user unless she enters a credit card number or adult access code or PIN. (Farmer Testimony, Olsen Testimony). A Web site can organize its directories and the files within the directories in any way it chooses. (Olsen Testimony; Farmer Testimony).

55. It appears uncontradicted that a content provider can segregate potentially harmful to minors images from other non-harmful to minors images and text on a single web page by organizing the potentially harmful to minors images into a separate directory such that a user could only call up those images on the page once she had entered her adult PIN, adult access code, or credit card number. The other images and text on the page would appear for all users. (Alsarraf Testimony). Text is more difficult to segregate than images, and thus if a written article contains only portions that are potentially harmful to minors, those portions cannot be hidden behind age verification screens without hiding the

whole article or segregating those portions to another page, without the use of Java scripts or other technology that would allow the text to be pieced back together once a user entered a credit card, access code, or PIN. (Farmer Testimony; Olsen Testimony).

56. The party's experts appear to agree that the length of time required for, and economic costs incurred by, a content provider to review the content currently on a Web site for potentially harmful to minors materials and reorganize or segregate such content depends (1) on the amount of content on a Web site, (2) whether the Web site operator or content provider can utilize a search mechanism to review its content, (3) whether a Web site is already organized into files and directories according to content, and (4) the familiarity a Web site operator has with the content of the files and directories. (Farmer Testimony; Olsen Testimony). The effort required to segregate new content on an ongoing basis over time once a Web site has been organized to implement the affirmative defenses in COPA may be a relatively easier and less expensive task for a Web site operator. (Olsen Testimony).

57. Some of the plaintiffs have contracts with advertisers, ISPs, or bounty partners which prohibit the Web site's ability to place advertisements near particular content on the Web site or post particular content that contains nudity or that is of a sexually explicit nature. (Defendant's Exs. 25 (under seal) and 105; Tepper Testimony). Such contracts indicate that market forces may necessitate Web site

operators and content providers who rely on advertising revenue to segregate content of a sexual nature regardless of COPA.

58. Once again the experts agreed that the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora, or to implement a full-time monitor on the site to read all content before it is posted. Because of the dynamic nature of the content of such interactive fora, there is no method by which the creators of those fora could block access by minors to harmful to minors materials and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors. (Farmer Testimony; Olsen Testimony).

4. *Security Issues*

59. COPA requires that content providers or Web site operators take the necessary precautions to prevent unauthorized access to the information they receive from users during the age verification process. Implementing security measures to safeguard the information provided by users, such as the use of encryption methods, SSLs, and secure servers, will impose some additional technological burdens and economic costs on Web site operators.

5. *Effect of Complying with COPA on Traffic*

60. Hoffman testified that she concluded in light of consumer behavior on the Web that COPA would

have a negative effect on users because it will reduce anonymity to obtain the speech and reduce the flow experience of the user, resulting in a loss of traffic to Web sites. She testified that it was her prediction that content providers would have to adopt one or more methods to comply with COPA by (1) eliminating content on the site that was, or potentially could be considered, harmful to minors, or (2) erect a age verification system on their Web site in front of harmful to minors materials, or (3) alter the questionable content to comply with COPA. Hoffman opined that whatever method of compliance a speaker elected, users may visit other sites which offered such material without a screen, which would result in loss of traffic to a site. (Hoffman Testimony). Olsen, one of the experts who testified for the defendant, conceded in his testimony that the number of users deterred from a site by registration requirements imposed by COPA could be in the thousands. (Olsen Testimony).

61. Hoffman testified that she concluded that the out of pocket costs associated with complying with COPA did not constitute the real economic burden on content providers, but rather it was the economic harm that would result from loss of traffic to the site that constituted the burden. Even though a Web site operator could pass the cost of compliance with COPA on to the consumer, Hoffman testified that in general users would refuse to pay to access content on the site.

62. Brian L. Blonder, an accountant with expertise in evaluating business plans and economic conduct,

testified that in his opinion, COPA would not impose an unreasonable economic burden from either out-of-pocket costs or loss of viewers on the seven Web sites of the plaintiffs which he investigated, including ArtNet, CNET, Salon Magazine, A Different Light Bookstore, Sexual Health Network, Planet Out, and Free Speech Media. (Blonder Testimony and Supplemental Expert Report).

63. It is reasonable to infer that the number of users deterred from a screened Web site or a screened portion of a Web site and the economic impact that such loss of viewers may have on a Web site depends in part on the number of users that visit the site, the strength of the motivation of the user to access the screened material, and the economic resources and revenues available to the Web site from other sources and content. The plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens.

E. *Blocking or Filtering Software*

64. The plaintiffs contend that a lesser restrictive means to achieve the goal of Congress of restricting the access of minors to materials that are harmful to them is the use of "blocking" or "filtering" technology.

65. It appears that the parties do not dispute that blocking or filtering software may be used to block Web sites and other content on the Internet that is inappropriate for minors. Such technology may be

downloaded and installed on a user's home computer at a price of approximately $40.00. Alternatively, it may operate on the user's ISP. Blocking technology can be used to block access by minors to whole sites or pages within a site. (Olsen Testimony). Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP. (Olsen Testimony).

66. It appears undisputed that blocking and filtering technology is not perfect in that it is possible that some Web sites that may be deemed inappropriate for minors may not be blocked while some Web sites that are not inappropriate for minors may be blocked. In addition, a minor's access to the Web is not restricted if she accesses the Web from an unblocked computer or through another ISP. It is possible that a computer-savvy minor with some patience would be able to defeat the blocking device. (Magid Testimony). No evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive.

67. Several Web sites associated with plaintiffs or declarants in this litigation, including Web sites of Condomania, Electronic Frontier Foundation, RiotGrrl, Sexual Health Network, A Different Light, PlanetOut, and Philadelphia Gay News, are currently blocked by SurfWatch and Cyberpatrol, which are two blocking or filtering programs. (Joint Stipulation Exhibit 3 ¶¶ 45-51).

VI. *Analysis of the Motion for Preliminary Injunction and Conclusions of Law*

A. *Substantial Likelihood of Success on the Merits*

For the purposes of the motion for preliminary injunction, the Court will focus its analysis on the claim of plaintiffs that COPA is unconstitutional on its face for violating the First Amendment rights of adults. The first task of the Court is to determine the level of scrutiny to apply to COPA; then the Court must apply that level of scrutiny to the statute to determine whether plaintiffs are likely to succeed on their claim that it does not pass constitutional muster.

1. *Standard of Scrutiny*

COPA is a content-based regulation of speech which is protected at least as to adults. Although there are lower standards of scrutiny where the regulation of general broadcast media or "commercial" speech, that is, speech that proposes a commercial transaction, are involved, neither is appropriate here. In *Reno I*, the Supreme Court found that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium," rejecting the argument that the lowered level of scrutiny applied to the broadcasting medium should be applied to the Internet. *See Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2344, 138 L.Ed.2d 874 (1997). The defendant asserted in her brief that the statute may be subject to the lower level of scrutiny which has been applied to the regulation of "commercial speech;" however, the defendant did not press that position for the purposes of the temporary restraining order, nor did she argue this position at the preliminary injunction hearing.

Further, it is clear that the case law setting forth the standard of scrutiny for the regulation of commercial speech is inapplicable to the statute before the Court.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). As a content-based regulation of such expression, COPA is presumptively invalid and is subject to strict scrutiny by this Court. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2351, 138 L.Ed.2d 874 (1997). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126, 109 S. Ct. 2829 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve compelling interests must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* Thus, the burden imposed on speech must be outweighed by the benefits gained by the challenged statute. *See Elrod v. Burns*, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *See, e.g., Sable*, 492 U.S. at 127, 109 S. Ct. 2829 (citing

Butler v. Michigan, 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957) (reversing a conviction under a statute which made it an offense to make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

2. *Burden on Speech Imposed by COPA*

The first step in determining whether a statute passes strict scrutiny is to assess the burden the statute places on speech. A statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression. *See Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 785 (3d Cir. 1990). One such deterrent can be a financial disincentive created by the statute. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991). The Court in *Erznoznik* noted that the regulation on speech at issue left the speaker "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

In *Simon & Schuster*, in which the constitutionality of a New York statute which required that the proceeds of any publication of any person who committed a crime be placed in an escrow account for the benefit of

the victims of the crime, the Supreme Court noted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." 502 U.S. at 115, 112 S. Ct. 501. "In the context of financial regulation, it bears repeating, . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116, 112 S. Ct. 501. The Court considered this law to be similar to an unconstitutional tax based on the content of speech, as "[b]oth forms of financial burden operate as disincentives to speak." *Id.* at 117, 112 S. Ct. 501. The Supreme Court found that the challenged law established a financial disincentive to create or publish works with a particular content, and as such, the government must justify such differential treatment by showing that the statute was necessary to serve a compelling interest and it narrowly drawn to achieve that end. *Id.*, at 118, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit considered the constitutionality of an amendment to the Pennsylvania Public Utility Act which required adults who wished to listen to sexually explicit recorded telephone messages to apply for an access code to receive such messages. The court noted that requiring an adult to obtain an access code exerted an inhibitory effect on speech, which "raises issues comparable to those raised by direct [government] imposed burdens or restrictions." *Id.* The court affirmed the district court's finding that access codes would chill or inhibit potential adult users of dial-a-porn, based on testimony that "impulse callers" would not access the material if they must apply for an access code, as well

as evidence that the plaintiffs' revenues dropped to $0 when they switched to an identification number system and the lack of any evidence from the Commonwealth to rebut the showing by plaintiffs. *Id.* at 785-86.

The district court in *Fabulous Associates* had found that the statute would impose additional costs on potential customers who owned rotary phones because they would need to purchase equipment so that the phone could utilize the access code. *Id.* at 786. The cost of the equipment ranged from $19.95 to $29.95. *Id.* The Court of Appeals observed that while this may not seem overly burdensome, the "First Amendment is not available 'merely to those who can pay their own way.'" *Id.* at 787 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S. Ct. 870, 87 L.Ed. 1292 (1943)). The court noted that this cost may be a deterrent to some users who may call the services on impulse or too infrequently to justify the extra cost. *Id.* at 787.

In *Reno I*, in determining whether the CDA imposed a burden on constitutionally protected adult speech, the Supreme Court adopted the district court's finding that "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." 521 U.S. 844, 117 S. Ct. 2329, 2347, 138 L.Ed.2d 874 (1997). The district court also found that there was "no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." *Id.* The Supreme Court noted that this limitation, as well as the prohibitively high economic burden of age verification for some sites, "must inevitably cur-

tail a significant amount of adult communication on the Internet." *Id.*

Much of the evidence and argument at the preliminary injunction hearing here focused on the economic costs that would be imposed on Web site operators and content providers, and particularly the plaintiffs in this action, in complying with COPA, including out-of-pocket costs of implementing the affirmative defenses, loss of revenue and potential closure of Web sites that could occur, and the ability of specific plaintiffs to shoulder these economic costs as incremental costs of running a commercial Web site. The defendant argues that the economic and technological burden imposed by COPA is not substantial and does not impose an unreasonable economic burden on Web site operators.

The economic costs associated with compliance with COPA are relevant to the Court's determination of the burden imposed by the statute. However, even if this Court should conclude that most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult verification screens, such conclusion is not dispositive. First Amendment jurisprudence indicates that the relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs, or of other Web site operators and content providers not before the Court. The protection provided by the First Amendment in this context is not diminished because the speakers affected by COPA may be commercial entities who speak for a profit. "The government's power to impose content-based financial disincentives on speech surely does not vary

with the identity of the speaker." *See Simon & Schuster*, at 117, 112 S. Ct. 501. Strict scrutiny is required, not because of the risk of driving certain commercial Web sites out of business, but the risk of driving this particular type of protected speech from the marketplace of ideas.

In assessing the burden placed on protected speech by COPA, it is necessary to take into consideration the unique factors that affect communication in the new and technology-laden medium of the Web. Each medium of expression "must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). For example, the plaintiffs have presented evidence that the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, or how old the users are, unless they take affirmative steps to gather information from the user and the user is willing to given them truthful responses. In the same vein, it can be inferred that any barrier that Web site operators and content providers construct to bar access to even some of the content on their sites to minors will be a barrier that adults must cross as well.

Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications. (Finding of Fact ¶¶ 61-62). The plaintiffs are likely to establish at trial that under

COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. (Finding of Fact ¶ 59). This has the effect of burdening speech in these fora that is not covered by the statute. I conclude that based on the evidence presented to date, the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults. The Court's analysis then turns to the likelihood of plaintiff's ability to make a successful showing that the statute is narrowly tailored to a compelling government interest.

3. *Compelling Government Interest*

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See Sable*, 492 U.S. at 126, 109 S. Ct. 2829 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968)). There is nothing in the legislative history of COPA that indicates that the intention of Congress was anything but the protection of minors. Congress recognized that the Web is widely accessible to minors and pornography is widely available on the Web. *See* H.R. Rep. No.105-775 at 9-10. Congress

expressed that its intent in COPA was to require "the commercial pornographer to put sexually explicit messages 'behind the counter'" on the Web, similar to existing requirements in some states that such material to be held behind the counter or sold in a paper wrapper in a physical store. *Id.* at 15.

4. *Narrow Tailoring and Least Restrictive Means*

While the plaintiffs have the burden in the context of the motion for preliminary injunction of showing success on the merits of their claims, the defendant ultimately will bear the burden of establishing that COPA is the least restrictive means and narrowly tailored its objective, which the defendant argues is the regulation of commercial pornographers. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). In *Elrod*, the Supreme Court described "least restrictive means" by stating that "if the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Id.* at 363, 96 S. Ct. 2673. Further, to survive constitutional challenge the statute "must further some vital government end by a means that is least restrictive of [First Amendment freedoms] in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.*

In *Simon & Schuster*, 502 U.S. 105, 121, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991), the Supreme Court, in holding that the "Son of Sam" law, which restricted the ability of a person who had committed a crime to profit by writing about it, was significantly overinclusive and thus not narrowly tailored, noted "that had the law been in effect at the time and place of publication, it

would have escrowed payment for such works as *The Autobiography of Malcolm X*, . . . *Civil Disobedience*, . . . even the *Confessions of St. Augustine*." While the Court recognized that this argument was "hyperbole," the Court noted that the law clearly reached a wide range of literature that was outside the scope of the statute's interest. *Id.* at 122, 112 S. Ct. 501.

In *Fabulous Associates*, the Court of Appeals for the Third Circuit upheld the district court's finding that a less restrictive means was available other than requiring access codes because calls to dial-a-porn could be pre-blocked until a customer requested otherwise. *Id.* at 787. The court held that even if some chill was associated with pre-blocking, it did not entail additional costs to the user nor did it require that the message provider purchase new equipment and absorb increased operating costs. *Id.* at 788.

The *Fabulous Associates* court rejected the Commonwealth's argument that central blocking was not as effective as the access code requirement of the statute because minors with phone lines could request unblocking or gain access to unblocked phones, or that a parent who chooses to unblock his phone for the parent's use would place the dial-a-porn messages within the reach of minors. *Id.* at 788. The court noted that "[i]n this respect, the decision a parent must make is comparable to whether to keep sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent." *Id.*

In evaluating the proposed less restrictive means, the court acknowledged that some minors will access

the dial-a-porn message if they are determined to do so; however, the court noted that preventing "'a few of the most enterprising and disobedient young people'" from obtaining access to these messages did not justify a statute that had the "'invalid effect of limiting the content of adult telephone conversations to that which is suitable for children.'" *Id.* at 788 (quoting *Sable Communications v. FCC*, 492 U.S. 115, 109 S. Ct. 2829, 2838, 2839, 106 L.Ed.2d 93 (1989)).

Here, this Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal. Moreover, there is some indication in the record that minors may be able to legitimately possess a credit or debit card and access harmful to minors materials despite the screening mechanisms provided in the affirmative defenses. *See Reno I*, 117 S. Ct. at 2349 (noting that "[e]ven with respect to the commercial pornographers that would be protected by the defense[s] [provided in the CDA], the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults"). These factors reduce the benefit that will be realized by the implementation of COPA in preventing minors from accessing such materials online.

On the record to date, it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to this material. Of course, the final determination must await trial on the merits. The plaintiffs suggest that an

example of a more efficacious and less restrictive means to shield minors from harmful materials is to rely upon filtering and blocking technology.[6] Evidence was presented that blocking and filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks. However, there was also evidence that such software blocks certain sources of content that COPA does not cover, such as foreign sites and content on other protocols. (Finding of Fact ¶ 66). The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means.

Beyond the debate over the relative efficacy of COPA compared to blocking and filtering technology, plaintiffs point to other aspects of COPA which Congress could have made less restrictive. Notably, the sweeping category of forms of content that are prohibited—"*any communication*, picture, image, graphic image file, article, recording, *writing*, or *other matter of any kind*" (emphasis added)—could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instance, only pictures, images, or

[6] The plaintiffs do not argue that Congress should statutorily require the use of such technology to shield minors from such materials.

graphic image files, which are typically employed by adult entertainment Web sites as "teasers." In addition, perhaps the goals of Congress could be served without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines, for communicating speech that is protected as to adults or without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them instead of incorporating the substance of the affirmative defenses in the elements of the crime.

B. *Irreparable Harm*

The plaintiffs have uniformly testified or declared that their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution, and this Court has concluded in the resolution of the motion to dismiss that such fears are reasonable given the breadth of the statute. Such a chilling effect could result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72,73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that is protected for adults under the First Amendment, which also constitutes irreparable harm.

C. ***Balance of Interests***

In deciding whether to issue injunctive relief, this Court must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court may ultimately rule on the merits of plaintiffs' claims at trial.

VII. ***Conclusion***

The protection of children from access to harmful to minors materials on the Web, the compelling interest sought to be furthered by Congress in COPA, particularly resonates with the Court. This Court and many parents and grandparents would like to see the efforts of Congress to protect children from harmful materials on the Internet to ultimately succeed and the will of the majority of citizens in this country to be realized through the enforcement of an act of Congress. However, the Court is acutely cognizant of its charge under the law of this country not to protect the majoritarian will at the expense of stifling the rights

embodied in the Constitution. Even at this preliminary stage of the case, I borrow from Justice Kennedy, who faced a similar dilemma when the Supreme Court struck down a statute that criminalized the burning of the American flag:

> The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.
>
> The hard fact is that sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Texas v. Johnson, 491 U.S. 397, 420, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring).

Despite the Court's personal regret that this preliminary injunction will delay once again the careful protection of our children, I without hesitation acknowledge the duty imposed on the Court and the greater good such duty serves. Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.

Based on the foregoing analysis, the motion to dismiss the plaintiffs for lack of standing will be denied.

Based on the foregoing findings and analysis, the Court concludes that the plaintiffs have established a likelihood of success on the merits, irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute pending a trial on the merits, and the motion of plaintiffs for a preliminary injunction will be granted.

An appropriate Order follows.

ORDER

AND NOW, this 1st day of February, 1999, upon consideration of the motion of plaintiffs for a preliminary injunction and supporting brief (Document No. 73), the response of the defendant (Document No. 82), and the supplemental reply brief of the plaintiffs (Document No. 74), as well as the exhibits, declarations, and other evidence submitted by the parties, having held a hearing on this motion in which counsel for both sides presented evidence and argument, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **PRELIMINARILY ENJOINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of

the Child Online Protection Act at any time[7] for any conduct[8] that occurs while this Order is in effect. This

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[7] As noted by this Court in the Order granting the plaintiffs' motion for a temporary restraining order on November 19, 1998, it appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

[8] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American*

Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[9]

IT IS FURTHER ORDERED that this preliminary injunction shall remain in effect until a final adjudication of the merits of plaintiffs' claims has been made.

IT IS FURTHER ORDERED that, upon consideration of the motion of defendant to dismiss the complaint of plaintiffs for lack of standing (Document No. 50), the response of plaintiffs (Document No. 69), and the reply thereto (Document No. 81), for the reasons set forth in the accompanying Memorandum, the motion is **DENIED.**

Booksellers Association, 484 U.S. 383, 392, 108 S. Ct. 636, 98 L.Ed.2d 782 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[9] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

Filed: Nov. 23, 1998

MEMORANDUM

Reed, J. **November 20, 1998**

The plaintiffs, representing individuals and entities who are speakers and content providers on the World Wide Web (the "Web"), many of whom are seeking to make a profit, and users of the Web who use such sites, filed a complaint in this Court challenging the constitutionality of the recently enacted Child Online Protection Act ("COPA") under the First and Fifth Amendments.[1] The plaintiffs allege in their complaint that COPA infringes upon protected speech of adults and minors and that it is unconstitutionally vague. The plaintiffs sought a temporary restraining order to

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[1] This Court has jurisdiction under 28 U.S.C. § 1331.

prohibit the Attorney General from enforcing COPA, which was to go into effect on November 20, 1998. *See* Attachment A. This memorandum sets forth pursuant to Federal Rule of Civil Procedure 65(d) the reasons for the issuance of the temporary restraining order yesterday. (Document No. 29).

COPA represents the efforts of Congress to remedy the constitutional defects in the Child Decency Act ("CDA"), the first attempt by Congress to regulate content on the Internet. The CDA was struck down by the Supreme Court in *ACLU v. Reno*, 117 S. Ct. 2329 (1997) as violative of the First Amendment. Resolution of the motion for temporary restraining order is the first stepping stone in determining the constitutionality of COPA.

To obtain a temporary restraining order, the plaintiffs must prove four elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the TRO issues than to the plaintiffs if the TRO does not issue; and (4) that the public interest, if any, weighs in favor of plaintiff. *See Drysdale v. Woerth*, 1998 WL 647281, *1 (E.D. Pa.) (citing *Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc.*, 143 F.3d 800, 803 (3d Cir. 1998)). The plaintiffs need not prove their whole case to show a likelihood of success on the merits. If the balance of hardships tips in favor of plaintiffs, then the plaintiffs must only raise "'questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.'" *ACLU v. Reno I*, 1996 WL 65464, *2 (E.D. Pa.) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

For the purposes of the resolution of this motion for a temporary restraining order, I assume that strict scrutiny should be applied to COPA to determine if it is narrowly tailored to achieve a compelling governmental interest.[2] *See ACLU v. Reno*, 117 S. Ct 2329, 2344 (1996) (concluding that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). In addition, the parties are in agreement that the "harmful to minors" speech described in COPA is protected speech as to adults.

Nonobscene sexual expression is protected by the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." *Id.* at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve these compelling interest must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. *Id.* at 127 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (reversing a conviction under a statute which made it an offense to

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[2] The government asserts in its brief that the statute may be subject to the lower level of scrutiny which has been applied to "commercial speech;" however, the government did not press that position for the purposes of the temporary restraining order at the hearing.

make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. *See id.* at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)). Thus, the issue for which the plaintiffs must show a likelihood of success on the merits is whether COPA is narrowly tailored to this interest. The defendant argued that COPA on its face is not a total ban on speech that is protected for adults because commercial communicators may avail themselves of the affirmative defenses to prosecution. The plaintiffs argue that COPA is not narrowly tailored to this legitimate, compelling interest because the affirmative defenses provided by the statute are technologically and economically unavailable to many of the plaintiffs and overly burdensome on protected speech. The plaintiffs further argue that speech that is protected as to adults will be chilled on the Web and COPA in effect will reduce the content of the Web to the level of what is acceptable for minors. Therefore, the plaintiffs argue, COPA unconstitutionally infringes upon speech that is protected as to adults.

A statute which has the effect of deterring of speech, even if not the total suppression of the speech, is a restraint on free expression. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.8 (1975) (considering the expense of erecting a wall around appellant's drive-in theater in determining whether an ordinance prohibiting public display of films containing nudity was narrowly tailored) (citing *Speiser v. Randall*, 357 U.S.

513 (1958)). The Court in *Erznoznik* noted that the regulation on speech at issue left the plaintiff "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Erznoznik*, 422 U.S. at 217.

The plaintiffs presented testimony from principals of two named plaintiffs, Norman Laurila, founder and owner of A Different Light, and David Talbot, CEO and editor of Salon Magazine, from which I find that they had conducted sufficient investigations which led them to the reasonable conclusion that attempting to avail themselves of the affirmative defenses provided in COPA would cause serious and debilitating effects on their businesses. Based on the evidence before me, I am satisfied that plaintiffs have raised serious and substantial questions as to the technological and economic feasibility of these affirmative defenses. (Testimony of Laurila; Testimony of Talbot). At least one other plaintiff reached the same conclusion. (Declaration of Barry Steinhardt).[3] Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults. Thus, I am satisfied that plaintiffs

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[3] The defendant objected to certain statements made by declarants which contained hearsay or lacked foundation. To the extent that any of the declarations contained statements that contained hearsay or lacked foundation, those statements were not relied on by the Court; the declarations submitted by the plaintiffs were only received for the purpose of determining whether the declarant conducted an investigation which lead him to a reasonable conclusion about the effect on his business of complying with COPA.

have shown a likelihood of success on the merits on their claim that COPA violates the First Amendment rights of adults.[4]

The defendant notes that "it is far from clear that plaintiffs have standing" to pursue this litigation. (Def.'s Brief at 11). However, the defendant has suggested that for purposes of disposition of the motion for temporary restraining order, the Court should assume that some of the plaintiffs are entities covered by COPA that engage in activities regulated by COPA. (Def.'s Proposed Conclusions of Law ¶ 2). In addition, the Court concludes that for purposes of the temporary restraining order, the plaintiffs have raised serious and substantial questions as to whether some of the materials posted on their Web sites are covered by the Act as material harmful to minors.

Because the plaintiffs have established to the satisfaction of the Court a likelihood of success on the merits of their challenge, they clear the remaining legally imposed hurdles to injunctive relief with ease.

The plaintiffs have persuaded me that at least with respect to some plaintiffs, their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an

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[4] This opinion does not purport to address the myriad of arguments presented by both sides, nor to address each of the grounds presented by the plaintiffs for invalidating the statute. Those arguments and claims will be dealt with by the Court at a later time to the extent that they are necessary to a full resolution of this case.

irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69 at 72, 73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

In deciding whether to issue injunctive relief, I must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. *See ACLU v. Reno*, 929 F. Supp. 824, 849 (1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court, with the benefit of a fuller factual record and thorough advocacy from the parties, may more closely examine the constitutionality of this statute.

Based on the foregoing findings and conclusions that the plaintiffs have established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute, the

motion for a temporary restraining order was granted in an Order dated November 19, 1998 (Document No. 29), a copy of which is attached to this Memorandum as Attachment B.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

ATTACHMENT A

Excerpts from the Child Online Protection Act

In what will be codified as 47 U.S.C. § 231, COPA provides that:

> (1) PROHIBITED CONDUCT.-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) INTENTIONAL VIOLATIONS.-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY.-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. §231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual

> or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. *Id.* at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231 (c) provides that:

> (c) AFFIRMATIVE DEFENSE.—
>
> (1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

ATTACHMENT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

JANET RENO, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES

ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the motion of plaintiffs for a temporary restraining order, the response of the defendant, the exhibits and declarations submitted by the parties, having held a hearing on this date in which counsel for both sides presented evidence and argument, and having found and concluded, for the specific reasons required under Federal Rule of Civil Procedure 65(b) set forth in a Memorandum to be issued forthwith, that plaintiffs have shown (1) a likelihood of success on the merits of at least some of their claims, (2) that they will suffer irreparable harm if a temporary restraining order is not issued, and (3) that the balance of harms and the public interest weigh in favor of granting the temporary restraining order, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney

General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **TEMPORARILY RESTRAINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time[1]

---

[1] It appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. *See Edgar v. MITE Corporation*, 457 U.S. 624, 647, 655 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. *See Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in *Edgar*). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

for any conduct[2] that occurs while this Order is in effect. This Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.[3]

IT IS FURTHER ORDERED that this temporary restraining order shall remain in effect for ten days which, calculated according to Federal Rule of Civil Procedure 6(a), expires on Friday, December 4, 1998.

The Court may modify this Order as the ends of justice require.

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR.

---

[2] The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. *See ACLU v. Reno*, 929 F. Supp. 824, 883 (1996); *Virginia v. American Booksellers Association*, 484 U.S. 383, 392 (1988) (noting that in the First Amendment context, "litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

[3] *See ACLU v. Reno*, 929 F. Supp. at 884 (citing *Temple University v. White*, 941 F.2d 201, 220 (3d Cir. 1991)).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE; ADDAZI INC. D/B/A CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; INTERNET CONTENT COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORE; RIOTGRRL; SALON INTERNET, INC.; WEST STOCK, INC.; PLANETOUT CORPORATION, PLANTIFFS-APPELLEES

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT-APPELLANT

Present: SCIRCA, *Chief Judge*[*] SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO,

FUENTES, SMITH, GARTH,[**] and BECKER,[***] *Circuit Judges*

---

[*] Judge Scirica became Chief Judge on May 4, 2003.

[**] Senior Circuit Judge Garth, who sat on the original panel, is limited to panel rehearing only.

[***] Judge Becker's term as Chief Judge ended on May 4, 2003.

SUR PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

The petition for panel rehearing and rehearing *en banc* filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for panel rehearing and petition for rehearing *en banc* is DENIED.

By the Court,

[signature illegible]
Circuit Judge

Dated: May 13, 2003

CLC/cc: BLHDAG DAG
CWSCAH CAH
DPACRH CRH
JMLCEP CEP
BATSP SP
SABMMP MMP
BJEJCS JCS
JBMBRB BRB
RBR
AEB
KMB

APPENDIX F

Section 231 of Title 47 of the United States Code (Supp. IV 1998) provides as follows:

Restriction of access by minors to materials commercially distributed by means of World Wide Web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a) of this section, a person shall not be considered to make any communication for commercial purposes to the extent that such person is—

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a) of this section—

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) of this section may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection,[1] the following definitions shall apply:

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or

---

[1] So in original. Probably should be "section,".

principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

(5) Internet information location tool

The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes

directories, indices, references, pointers, and hypertext links.

(6) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

APPENDIX G

Section 231 note of Title 47 of the United States Code (Supp. IV 1998) Congressional Findings provides as follows:

CONGRESSIONAL FINDINGS

Pub. L. 105-277, div. C, title XIV, § 1402, Oct. 12, 1998, 112 Stat. 2681-736, provided that: "The Congress finds that—

"(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

"(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

"(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

"(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

"(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the internet."

SEP 10 2003

03-218

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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40 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the criminal and civil provisions of the Child Online Protection Act, 47 U.S.C. § 231, violate the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; BlackStripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Media Group, Inc.; and West Stock, Inc., now known as ImageState North America, Inc. The plaintiff Internet Content Coalition is no longer in existence.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

(1) The parent corporation of respondent ArtNet Worldwide Corporation is ArtNet AG.

(2) Approximately 30% of the stock of respondent OBGYN.net is owned by MediOne, Inc., an affiliate of Medison Co., Ltd.

(3) The parent corporation of respondent Philadelphia Gay News is Masco Communications.

(4) PlanetOut Corporation now exists as part of PlanetOut Partners USA, Inc., which is a subsidiary of PlanetOut Partners, Inc. JP Morgan Partners and affiliated entities of JP Morgan Partners together hold more than 10% of the shares issued and outstanding of PlanetOut Partners, Inc. AOL Time Warner Inc., which had been listed as a major shareholder in prior stages of this litigation, does not hold more than 10% of the shares issued and outstanding of PlanetOut Corporation or PlanetOut Partners, Inc.

(5) The parent corporation of respondent West Stock, Inc., which has been renamed ImageState North America, Inc., is ImageState, PLC.

(6) Respondent Salon Internet Inc. is now known as Salon Media Group, Inc.

(7) Respondent Internet Content Coalition no longer exists.

(8) Respondent Riotgrrl hosts a Web site that is no longer operating.

(9) The following respondents do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: Addazi Inc. d/b/a/ Condomania, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ A Different Light Book Stores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Powell's Bookstore, RiotGrrl, and Salon Media Group, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

STATEMENT OF THE CASE 1

A. The District Court's Decision and Factual Findings .. 2

1. Plaintiffs and Their Speech Affected By COPA 3

2. The Impact of COPA On Communication On The Web 4

3. User-Based Filtering Programs 7

B. The Court of Appeals' Initial Opinion 8

C. This Court's Prior Ruling 8

D. The Court of Appeals' Ruling On Remand 9

SUMMARY OF ARGUMENT 10

ARGUMENT

THIS CASE DOES NOT MERIT REVIEW BECAUSE THE DECISION BELOW APPLIES THIS COURT'S WELL-ESTABLISED RULE THAT CONGRESS MAY NOT CRIMINALIZE SPEECH PROTECTED FOR ADULTS IN AN EFFORT TO PROTECT MINORS 12

A. COPA Criminalizes A Wide Range Of Speech That Is Constitutionally Protected For Adults 12

B. COPA Cannot Be Saved By Radical Surgery That Would Alter Its Plain Language 16

C. COPA's Affirmative Defenses Do Not Save The Statute, Because They Will Prevent Or Deter Adult Web Users From Accessing A Wide Range of Protected Speech 18

1. COPA's Affirmative Defenses Do Not Protect Speakers From Prosecution for Communicating Protected Speech 19

2. COPA Would Require Web-Based Interactive Chat Rooms To Restrict Speech Not Even Covered By the Statute 20

3. Mandatory Registration Will Unconstitutionally Prevent Or Deter Web Users From Accessing Protected Speech 21

4. COPA's Burdens Are Far Greater Than Those Imposed By State Harmful-to-Minors Display Laws 24

D. COPA Is An Ineffective Means For Achieving The Government's Compelling Interest, and Less Restrictive Alternatives Are Available 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

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202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd in part*, No. 02 Civ. 7785, 2003 WL 22016812 (2d Cir. Aug, 27, 2003) 25

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969 F. Supp. 160 (S.D.N.Y. 1997).....25

Ashcroft v. American Civil Liberties Union,
122 S. Ct. 1700 (2002).....9, 18

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122 S. Ct. 1389 (2002).....14, 15, 16, 17

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463 U.S. 60 (1983).....15, 17

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223 F. Supp. 2d 932 (S.D. Ohio 2002).....26

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413 U.S. 601 (1973).....15

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352 U.S. 380 (1957).....15, 17

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447 U.S. 557 (1980).....27

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142 F. Supp. 2d 827 (E.D. Mich. 2001).....25

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518 U.S. 727 (1996).....23

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422 U.S. 205 (1975).....15

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491 U.S. 524 (1989).....27

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381 U.S. 301 (1965).....23

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319 U.S. 141 (1943).....23

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R.A.V. v. City of St. Paul,
505 U.S. 377, (1992).....14

Reno v. American Civil Liberties Union,
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492 U.S. 115 (1989).....15, 17

Shea v. Reno,
930 F. Supp. 916 (S.D.N.Y. 1996).....19

United States v. American Library Ass'n,
123 S. Ct. 2297 (2003).....23, 26

United States v. National Treasury Employees Union,
513 U.S. 454 (1995).....16

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000)... .....16, 23, 27

United States v. Reese,
92 U.S. 214 (1875).....16

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47 U.S.C. § 223.....2

47 U.S.C. § 231.....passim

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents American Civil Liberties Union, *et al.*, hereby submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231 (1998), was signed into law on October 21, 1998. The following day, plaintiffs filed this suit in the United States district court for the Eastern District of Pennsylvania, alleging that COPA violated the First Amendment to the Constitution. Plaintiffs sought an injunction to prevent COPA's enforcement.

A. The District Court's Decision and Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA, which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make [] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The findings describe the character and the dimensions of the Internet, the nature of the speech at risk under the law, the inability to verify the age of Internet users and the effect of the law on speakers and adult readers. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223, holding that "it would be prohibitively expensive for . . . some commercial[] speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet." *Id.* at 877 (citation omitted); *see also* Appendix to Petition for a Writ of Certiorari ("App.") 146a, 147a. Petitioner has not disputed the district court's findings either on appeal or in this petition, and some of those findings were derived from a joint stipulation submitted by the parties. *See* App. 121a-148a. Based on this record, the district court held that plaintiffs were likely to succeed on their claim that COPA violates the First Amendment, because "COPA imposes a burden on speech that is protected for adults," App. 156a, and because the government could not prove that COPA is the "least restrictive means available to achieve the goal of restricting

the access of minors to [harmful to minors] material," App. 159a.

1. Plaintiffs and Their Speech Affected By COPA

Plaintiffs include a diverse range of individuals, entities, and organizations, ranging from "new media" online magazines to long-established booksellers and large media companies. All plaintiffs use the World Wide Web (the "Web") to provide information on a variety of subjects, including sexually oriented issues that they fear could be construed as "harmful to minors." *See* App. 129a-133a, ¶¶21, 24-26.

Plaintiffs and their users post, read and respond to sexually explicit content on the Web including visual art and poetry; information about obstetrics, gynecology, and sexual health; books and photographs; online magazines; and resources designed for gays and lesbians. *See* App. 129a, ¶21. Several plaintiffs host Web-based discussion groups and chat rooms that allow readers to converse on various subjects. *See* App. 129a, ¶22.

Like the vast majority of speakers on the Web, plaintiffs provide the great bulk of their online information for free. *See* App. 129a, ¶23. Like traditional newspapers and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See* App. 134a-134a, ¶33; 47 U.S.C. §231(e)(2)(B). Although certain plaintiffs are large, well-known Web publishers,

others are start-up operations run by single individuals. *See, e.g.*, Court of Appeals Joint Appendix ("J.A.") 139-40.[1]

2. The Impact Of COPA On Communication On The Web

The growth of commercial activity on the Web has been explosive. At the time of the district court's decision, approximately one third of the 3.5 million sites on the Web were commercial within the meaning of COPA in that their operators "intend to make a profit." App. 133a, ¶27. Because "[t]he best way to stimulate user traffic on a Web site is to offer some content for free to users . . . . virtually all Web sites offer at least some free content." App. 135a, ¶34. The "vast majority of information . . . on the Web . . . is provided to users for free." App. 129a, ¶23. It is generally not possible for a Web speaker to verify the age of a person accessing the speaker's content. *See* App. 128a, ¶18; 155a.

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* App. 136a-137a, ¶37; 177a. The district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." App. 136a-137a, ¶37. Thus, the uncontested evidence showed that the only technologies currently available for compliance with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity

[1] Respondents cite to the Joint Appendix, which was originally filed in the petitioner's initial appeal to the Third Circuit, and incorporated into all subsequent appellate proceedings.

before gaining access to restricted content. *Id.* at 131a-133a, ¶¶25-26; 155a.

In addition, petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful-to-minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora." App. 145a, ¶58. Web-based interactive fora are inherently dynamic, and there is no way to prohibit access to some materials "and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.* Plaintiffs testified that these interactive fora are essential in attracting users to their Web sites. *See* J.A. 221.

The district court also found that credit cards and adult access codes would deter adults from accessing other Web-based content and impermissibly burden their First Amendment rights. *See* App. 131a-133a, ¶¶25-26; 155a. Because almost all content on the Web is available without the need to register and provide personal information, Web users are reluctant to provide such information to Web sites. *See id.* 129a, ¶23; 135a, ¶35; 136a, ¶36. Peer-reviewed studies have shown that up to 75% of Web users are deterred by registration requirements; two-thirds of consumers would not even accept money in exchange for giving up personal information to Web sites. J.A. 227, 238 (Hoffman Testimony). Users "will only reveal credit card information at the time they want to purchase a product or service." App. 136a, ¶36. For this reason, Web sites that have required registration or payment before granting access "have not been successful." *Id.* Plaintiffs testified that any mandatory registration would drive away their users. *See* J.A. 330-31, 344, 367-68, 370. Many of the plaintiffs' readers and other Web users are particularly reluctant to identify themselves

because the information they seek is intensely personal, sensitive, or controversial. Mr. Tepper of the Sexual Health Network, for example, testified that some of his readers would simply not go to his site if they had to identify themselves. App. 131a, ¶25. His site aims to provide information about sexuality to disabled persons who will only seek it anonymously. Similarly, many gay or lesbian people who are "closeted" rely on a Web site such as PlanetOut "because it allows closeted people access to this information while preserving their anonymity." *Id.* at 132a, ¶26.

In addition, to utilize COPA's credit card defense, a content provider "would need to undertake several steps," App. 138a, ¶41, with start-up costs ranging from "approximately $300 . . . to thousands of dollars. . . ." App. 138a, ¶42. The district court found that "it was not clear from the conflicting testimony" whether credit card verification services will authorize or verify a credit card number in the absence of a financial transaction. App. 139a, ¶45. Without such a service, a content provider would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129. Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. *See* App. 139a, ¶45. Such per-authorization fees would allow users hostile to certain content to drive up costs to the provider by repeatedly accessing restricted content. *See* J.A. 133.

Finally, COPA's credit card and adult access defenses would require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that this could be prohibitively expensive, and, in some cases, would require plaintiffs to shield even some materials not "harmful to minors" behind age verification screens. As the district court recognized, the technological requirements for implementing credit card or adult access code verification to comply with COPA could be substantial – depending on

the amount of content on a Web site, the amount of content that may be "harmful to minors," the degree to which a Web site is organized into files and directories, the degree to which "harmful to minors" material is currently segregated into a particular file or directory and the level of expertise of the Web site operator. *See* App. 137a, ¶39; App. 144a, ¶56. COPA would require some Web sites to reorganize and redesign literally millions of files. *See* J.A. 158-59. A content provider also would have to reorganize individual files and pages in order to restrict only content that could be "harmful to minors". *See* App. 143a, ¶54. In addition, even a single page of Web content could have some content that was prohibited under COPA and some that was not, making it difficult if not impossible to segregate such material. *See* App. 143a-144a, ¶55.

In sum, the district court concluded that "the implementation of credit cards or adult verification screens before gaining full access to material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." App. 155a.

3. *User-Based Filtering Programs*

In contrast to the burden imposed by COPA, user-based filtering software constitutes a less restrictive and more effective alternative. As the district court found, COPA does not even reach a substantial portion of material posted on the Web that may be "harmful to minors." COPA does not restrict the wide range of "harmful to minors" materials provided noncommercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *See* App. 159a. In addition, at the time of the district court's opinion, at least forty percent of Web content originated abroad, and minors could just as easily

access this material as they could the remaining sixty percent originating domestically. *See* App. 128a, ¶20.

In contrast, even the government's expert conceded that parents can use user-based blocking software to prevent access to these materials, in addition to blocking Web-based commercial materials. *See* App. 147a-148a, ¶65. To establish these controls, parents need only purchase software for their home computers or choose an Internet Service Provider or online service such as American Online that offers parental software controls. *Id.* These services also may provide tracking and monitoring software to determine which resources a child has accessed, and offer access to children-only discussion groups that are closely monitored by adults. Thus, though not perfect, the district court found that user-based blocking software is at least equally effective and less restrictive than COPA's criminal penalties.

B. The Court of Appeals' Initial Opinion

On appeal, the Third Circuit upheld the district court's ruling that COPA violates the First Amendment, *see* App. 69a. The court held that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." App. 69a. The court affirmed on this narrow ground, and did not reach the other grounds relied upon by the district court.

C. This Court's Prior Ruling

This Court vacated and remanded the decision by the Court of Appeals finding COPA unconstitutional. Rejecting the Third Circuit's approach, the Court narrowly held "that

COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft v. American Civil Liberties Union*, 122 S. Ct. at 1713 (emphasis in original). Significantly, however, the Court did not lift the injunction preventing the government from enforcing COPA absent further action. *Id.* at 1713-14. The Court then remanded the case for further proceedings on issues including "whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the district court correctly concluded that the statute likely will not survive strict scrutiny analysis...." *Id.* at 1713.

D. The Court of Appeals' Ruling on Remand

On remand, the Third Circuit reaffirmed its conclusion that COPA was unconstitutional. App. 18a. In its primary holding, the court ruled that COPA failed strict scrutiny because it would deprive adults of material they are constitutionally entitled to receive. App. 38a. The court also held that the statute was both overbroad and vague. App 49a-58a.

Reviewing the plain language of the statute, the court concluded that COPA "endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted ...." App. 23a. The court rejected the government's plea to re-write the statute to narrow its application, and found that COPA's affirmative defenses, identical to those previously rejected by this Court in *Reno v. ACLU*, did nothing to ameliorate the statute's burden on speech protected for adults. The court further held that other alternatives, including Internet filtering software, were "substantially less restrictive than COPA in achieving

COPA's objective of preventing a minor's access to harmful materials." App. 47a.

SUMMARY OF THE ARGUMENT

Petitioner seeks further review of the Child Online Protection Act (COPA), which makes it a crime to communicate material that is harmful to minors on the Web. There are, however, no new issues left in this case that merit review. The relevant facts are uncontested and the governing legal framework has been clearly set forth in this Court's prior decisions.

COPA was passed in 1998, when the Internet was still relatively new and less well understood. Like Congress' first attempt at legislation in this area, struck down by this Court in *Reno v. ACLU*, COPA relies exclusively on threatening Web speakers with severe criminal and civil penalties for communicating constitutionally protected speech. COPA was passed prior to any serious study of alternatives by Congress. Since then, two commissions have provided Congress with detailed reports that offer a number of ways to protect children from harm online without restricting adult speech rights. This Court has also recently upheld another federal statute that requires the use of one of those alternatives – user-based filtering software – in all public schools and libraries.

Given this altered landscape, there is no reason for further review of the lower court decision enjoining COPA. The decision below establishes no new principles, but merely applies this Court's well-established rule, specifically affirmed in the Internet context, that Congress may not enforce its interest in protecting minors by making it a crime to communicate constitutionally protected material to adults. In accordance with that rule, federal courts have now

unanimously struck down *seven* state statutes nearly identical to COPA.

Specifically, COPA threatens protected speech with criminal sanctions and suppresses a large amount of speech that adults have a constitutional right to communicate and receive on the Web. Petitioners argue that review is necessary because the lower court misinterpreted the breadth of the statute. But under any interpretation COPA clearly criminalizes speech that adults are constitutionally entitled to receive. The extensive record in this case, undisputed by the government, establishes that COPA reaches millions of content providers who have no effective way to prevent minors from obtaining their speech without also deterring and burdening access by adults. The two reports commissioned by Congress now confirm the district court's key findings in this case: credit cards and adult access codes are ineffective and deter adults from accessing protected speech, whereas filters are a more effective and less restrictive option for parents who wish to restrict their children's online viewing. Under this Court's clear precedents, COPA thus violates strict scrutiny and is overbroad.

For all of these reasons, the petition for certiorari should therefore be denied.

ARGUMENT

THIS CASE DOES NOT MERIT REVIEW BECAUSE THE DECISION BELOW APPLIES THIS COURT'S WELL-ESTABLISHED RULE THAT CONGRESS MAY NOT CRIMINALIZE SPEECH PROTECTED FOR ADULTS IN AN EFFORT TO PROTECT MINORS.

A. COPA Criminalizes A Wide Range Of Speech That Is Constitutionally Protected For Adults.

In its attempt to deny minors access to certain speech, COPA suppresses a broad array of speech that adults have a constitutional right to receive. *See* App. at 23a ("while COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults"); *Reno v. ACLU*, 521 U.S. at 876-77. There is no way for a Web speaker to know the age of a user who is accessing her communications on the Web. In order to avoid the risk of criminal prosecution and civil penalties, on its face COPA effectively requires Web speakers to deny both minors *and adults* access to any speech that may be considered "harmful to minors." COPA's threat of jail time "may well cause speakers to remain silent rather than communicate even arguably unlawful words or ideas, and images." *Reno v. ACLU*, 521 U.S. at 874.

COPA criminalizes a category of speech that is unquestionably protected for adults. The record in this case is full of examples that illustrate the breadth of protected speech that falls within COPA's ambit:

- ArtNet's Web site displays photographs from Andres Serrano's series "A History of Sex." J.A. 710-13 (ArtNet PI Exhs.).

- ACLU member Patricia Nell Warren's Web site includes a graphic account of a fifteen-year-old who was date-raped when she was thirteen. J.A. 732-36 (Warren PI Exhs.).

- A Different Light's site contains an article describing a gay author's first experience of masturbation. J.A. 609-12 (Laurila PI Exhs.).

- Salon publishes Susie Bright's columns describing her sexual experiences including anally penetrating her boyfriend and having sex outdoors. J.A. 617-26 (Talbot PI Exhs.).

- PlanetOut offers archives of an Internet radio show called "Dr. Ruthless" that discusses topics such as anal sex and masturbation. J.A. 658-60 (Reilly PI Exhs.).

See also App. at 52a-54a & n.35 (citing *amicus curiae* briefs).

Popular Web-based chat rooms and discussion boards involving sexual topics are also covered. COPA would criminalize PlanetOut's forty chat rooms about gay sexuality and Salon's frank discussions about whether "boys can find the right spot." *See* J.A. 359 (Reilly Testimony); J.A. 638-41 (Talbot PI Exhs.). Given the popularity of interactive messages and the more than one million commercial Web sites, the examples above are far from isolated. App. 133a, ¶27; *see also* App. at 52a-54a (citing AMICUS BRIEFS). While such content is appropriate for adults, such

unapologetically explicit speech finds itself well within COPA's reach.

As a content-based regulation of protected speech, COPA is presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Content-based regulations of speech will be upheld only if they are justified by a compelling governmental interest and are "narrowly tailored" to effectuate that interest. In concluding that strict scrutiny applies to content-based bans, this Court has held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. at 870; *see also id.* at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

Just in the last few years, this Court has struck down two federal statutes aimed at protecting minors because they "proscribe[d] a significant universe of speech that is neither obscene ... nor child pornography." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1396 (2002) (invalidating Congress' attempt to ban "virtual" child pornography); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating statute that criminalized indecent communications on the Internet). While this Court "ha[s]... recognized the governmental interest in protecting children from harmful materials... that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 875 (citations omitted); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.").

Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," this Court has *never* upheld a

criminal prohibition on non-obscene communications between adults. *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotations omitted)); *see also Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) (invalidating statute that banned and criminalized the distribution of indecent speech); *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized the showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (invalidating a conviction for distribution of indecent publications).

COPA was also correctly analyzed and enjoined under this Court's overbreadth cases, which hold that a statute is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Free Speech Coalition*, 122 S. Ct. at 1399; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The Third Circuit held that COPA cannot stand because it "encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors." App. at 51a; *see also Reno v. ACLU*, 521 U.S. at 874 (invalidating CDA because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.") Indeed, because COPA "impos[es] criminal penalties on protected speech," it is a "textbook example of why ... facial challenges [are permitted] to statutes that burden expression." *Free Speech Coalition*, 122 S. Ct. at 1398.

B. COPA Cannot Be Saved By Radical Surgery That Would Alter Its Plain Language

Petitioner urges review because the Third Circuit, in his view, has misinterpreted the breadth of the statute. As an initial matter, the correct interpretation of the statute poses no question for review because under *any* interpretation COPA unconstitutionally burdens speech clearly protected for adults. While narrower than the online indecency standard invalidated by this Court in *Reno v. ACLU*, speech that is harmful to minors is by definition non-obscene. This Court has struck down similar laws that restrict narrower but undisputedly protected categories of speech because of their burden on adult access. *See, e.g., Free Speech Coalition,* 122 S. Ct. at 1399; *United States v. Playboy*, 529 U.S. 803, 806 (2000).

Applying this Court's precedents, the lower court correctly declined to rewrite the statute to narrow its reach, and there is no need for this Court to grant review to perform the kind of radical surgery it has rejected in prior cases. *See Reno v. ACLU*, 521 U.S. at 884-85; *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995); *United States v. Reese*, 92 U.S. 214, 221 (1875).

First, petitioner has now largely conceded that COPA's application to Web sites operated for "commercial purposes" does nothing to limit its reach. COPA applies to speech that is provided *for free* on the Web by commercial businesses like Salon magazine and PlanetOut, and not just to speech that is for sale. Thus, petitioners agree that COPA extends "to businesses that seek to profit from harmful material by selling advertising space." Cert. Pet. at 21. Petitioner also concedes an intent to apply COPA's criminal sanctions to businesses that offer material that is harmful to minors, even if not a "principle part" of their businesses. *See*

Cert. Pet. at 21. Indeed, the statute specifically notes that speakers are subject to prosecution even if providing "harmful" materials is not their "sole or principal business or source of income." 47 U.S.C. § 231(e)(2)(B). The text of COPA also imposes liability on any speaker who knowingly makes any communication for commercial purposes "*that includes any material* that is harmful to minors." 47 U.S.C. 231(a); 47 U.S.C. 231(e)(2)(B). Thus, any harmful-to-minors material posted on a Web site – even just one Serrano photograph on the Web site of plaintiff ArtNet or one "Sexpert Opinion" column in Salon, J.A. at __ – would subject the speaker to COPA's criminal penalties.

Second, the Court of Appeals correctly rejected petitioner's plea to rewrite the statute to exclude all material with serious value for "normal, older adolescents." In passing COPA, Congress itself identified as objects of concern children who cannot be described as older adolescents. *See* App. 25a (quoting H.R. Rep. No. 105-775, at 9-10). Even if the statute were rewritten to exclude material with value for older minors, COPA remains defective under this Court's clear precedents because it still unconstitutionally restricts *adults* from viewing that category of material. *ACLU v. Reno*, 521 U.S. 844; *Free Speech Coalition*, 122 S. Ct. at 1396; *Sable*, 492 U.S. at 131; *Bolger*, 463 U.S. at 74; *Butler*, 352 U.S. at 383-84.

Third, the Court of Appeals rightly held that the statute is too broad because it requires "evaluation of an exhibit on the Internet in isolation, rather than in context." App. 22a. Petitioner criticizes that holding by referencing language in the statute that requires consideration of the material "as a whole," Cert. Pet. At 17, but never explains what that requirement means in the context of the seamless Web. That is, petitioner still has no answer to Justice Kennedy's question in his prior concurring opinion in this case: "It is unclear whether what is to be judged as a whole

is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." 122 S. Ct. at 1717; *see also* App. 128a, ¶17 ("From a user's perspective, [the Web] may appear to be a single, integrated system."). In fact, petitioner has previously argued to this Court that some of the individual Web pages on respondents' enormous Web sites "plainly do test, and likely exceed, the legal limitations" of the harmful-to-minors test. *See* Gov. S. Ct. Br. at 37. The Third Circuit thus correctly concluded that this flaw, one of many, contributes to COPA's overbreadth.

C. COPA's Affirmative Defenses Do Not Save The Statute, Because They Will Prevent Or Deter Adult Web Users From Accessing A Wide Range Of Protected Speech.

COPA threatens any speaker on the Web who displays any material that is "harmful to minors" with severe criminal and civil sanctions. COPA provides only affirmative defenses for "good faith" efforts to restrict access by minors to material that is "harmful to minors," such as by requiring the use of a credit card or adult access code. *See* 47 U.S.C. § 231(c)(1)(A). Consistent with this Court's rejection of the same defenses in *Reno v. ACLU*, the district court found that either option would inevitably deter adults from accessing protected speech. In addition, as discussed below, last year Congress received two commissioned reports that confirm the findings of the district court. The first report was mandated through another provision enacted by Congress when it passed COPA.[2] *See* Commission on Child Online Protection, Final Report to Congress, Oct. 20, 2002 at

[2] The COPA Report essentially served as a substitute for thorough congressional findings. COPA was passed as part of an omnibus appropriations bill, with no hearings in the Senate and only one in the House.

http://www.copacommission.org/report (hereinafter "COPA Report"). The second report was conducted by the National Research Council, and is a comprehensive four-hundred-page study edited by former Attorney General Dick Thornburgh. *See* Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, Youth, Pornography, and the Internet, Dick Thornburgh and Herbert S. Lin, eds., (2002) at http://www.nap.edu (hereinafter "NRC Report").

1. COPA's Affirmative Defenses Do Not Protect Speakers From Prosecution for Communicating Protected Speech.

As an initial matter, the Third Circuit rightly noted that "the affirmative defenses do not provide the Web publishers with assurances of freedom from prosecution." App. at 36a-37a. COPA's criminal penalties will thus have a strong chilling effect even on those speakers who may be entitled to rely on an affirmative defense at trial. As this Court explained when striking down the Child Pornography Prevention Act ("CPPA"), "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." 122 S. Ct. at 1404; *see also Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996) (striking down the federal CDA, and noting that affirmative defenses "in no way shield[] a content provider from prosecution"), *aff'd*, 521 U.S. 1113 (1997). Speakers who want to communicate harmful-to-minors materials to adults are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses that would inhibit vast numbers of their adult users from accessing protected speech.

2. COPA Would Require Web-Based Interactive Chat Rooms To Restrict Speech Not Even Covered By The Statute.

COPA's affirmative defenses do nothing to alleviate the burden on protected speech in Web-based chat rooms and discussion groups. These interactive forums are vital contributors to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Reilly Testimony). The hundreds of thousands of people who have communicated on respondents' sites alone represent only a miniscule portion of the discussions occurring at any moment on the Web. Yet COPA would require that users of any Web chat or discussion provide a credit card or adult access code before entering the discussion – even if the discussion ultimately contains no speech that is not harmful to minors. As the district court explained,

> The uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. This has the effect of burdening speech in these fora that is not covered by the statute.

See App. 156a. COPA would thus halt the great majority of all online discussions on commercial Web sites, and the "worldwide conversation" that is the Internet would be greatly curtailed as a result. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

3. Mandatory Registration Will Unconstitutionally Prevent Or Deter Web Users From Accessing Protected Speech.

The district court also found that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter [adult] users from accessing such materials." App. 155a. The record showed that there is no technology available to enable credit card verification for speakers on the Web who publish through commercial online services such as America Online, J.A. 392 (Farmer Testimony), which has millions of subscribers. *See generally* J.A. at 389-90 (Farmer Testimony) (discussing the absence of credit card verification generally on the Web). For these speakers, the credit card defense is no defense at all. *See Reno v. ACLU*, 521 U.S. at 881-82.. In addition, COPA will prevent all adults who do not have credit cards from accessing harmful-to-minors materials on the Web. For these adults, COPA operates as a complete ban on their ability to access protected speech. *Reno v. ACLU*, 521 U.S. at 874-75.

COPA will deter most adults (even those with credit cards) from accessing restricted content, because Web users are simply unwilling to provide identifying information in order to gain access to content. To utilize either COPA's adult access code or credit card defense, Web providers would have to require all of their users to provide identifying information before accessing protected speech, perhaps to an untrusted third-party Web site. J.A. 379 (Farmer Testimony). Respondents testified that their customers would simply forgo accessing their material entirely if forced to apply for an adult access code, provide a credit card number, or pay for content. J.A. 330-31, 344, 367-68, 370 (Barr, Rielly, Tepper Testimony).

The record shows that up to 75% of Web users are deterred by registration requirements. J.A. 227, 238 (Hoffman Testimony). Another peer-reviewed study showed that two-thirds of consumers would not give up personal information to Web sites even in exchange for money. J.A. 227, 238 (Hoffman Testimony). These findings are consistent with the findings affirmed by this Court in striking down the Communications Decency Act, where evidence suggested "that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password." *Reno v. ACLU*, 521 U.S. at 857 n.23.

Web users who wish to access sensitive or controversial information are even less likely to register to receive it. For example, Dr. Tepper testified that persons who access the Sexual Health Network "have already been too embarrassed or ashamed to ask even their doctor. I think if they come across this barrier to access, that they are just not going to take the next step and put their name and credit card information in." J.A. 344 (Tepper Testimony). The use of credit card or adult access code verification may also require users to pay a fee, further increasing COPA's deterrent effects. J.A. 396 (Farmer Testimony). Finally, the evidence showed that respondents' users would be deterred by adult access code services that cater to the pornography industry, and would not want to affiliate with such services in order to gain access to plaintiffs' and similar "harmful to minors" materials. J.A. 156 (Talbot Testimony).

The COPA and NRC Reports support the lower courts' rulings. The COPA Report found that where either age verification or credit cards are required, "[a]n adverse impact on First Amendment values arises from the costs imposed on content providers, and because requiring identification has a chilling effect on access." COPA Report at 26-7. The National Research Council found that

"widespread [use of age verification technology] may compromise the privacy of adult viewing." NRC Report at 347, section 13.3.7. When users are required to give personally identifying information to verify age, "the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has a plausible reason to be concerned that his name is associated with certain types of material." NRC Report at 344, section 13.3.5. This loss of privacy "may inhibit free flow of information and create a chilling effect on the freedom of adults who wish to access lawful though perhaps controversial material." NRC Report at 348, section 13.3.7.

This Court has held in many prior cases that this form of inhibition renders a statute unconstitutional. *See Reno v. ACLU*, 521 U.S. at 857 n.23; *Denver Area Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 746 (1996) (holding that statute blocking certain cable channels and requiring users to request that those channels be unblocked unconstitutionally burdened subscribers access to information); *Playboy*, 529 U.S. at 924 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operations to scramble channels as a default); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (invalidating on First Amendment grounds a statute requiring that individuals request certain mail in writing, holding the statute would have "a deterrent effect"); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (holding that statute prohibiting door-to-door distribution of information violated First Amendment rights of "those desiring to receive it").[3]

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[3] Petitioners wrongly rely on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), to argue that COPA's deterrent effects do not render it unconstitutional. Unlike COPA, the statute upheld in that case did not threaten protected speech

4. COPA's Burdens Are Far Greater Than Those Imposed By State Harmful-to-Minors Display Laws.

Ignoring contrary case law from courts around the country, petitioner argues that this case merits review because the burdens COPA imposes are no different in kind or degree from display requirements that many states impose on material deemed harmful to minors. Cert. Pet. at 22-23. As the lower court held, COPA's burden on speech is far greater than in any of the cases cited by petitioner. App. 32a-38a. None of the blinder rack cases address the unique problems presented by regulation of harmful-to-minors material on the Internet. *Reno v. ACLU*, 521 US. at 889-91 ("the Court has previously only considered laws that operated in the physical world"). Federal courts have now struck down *seven* state harmful-to-minors display laws modeled on COPA and enacted to govern the Internet because they unconstitutionally deter adults from accessing protected speech.[4] In addition, unlike COPA, state blinder rack laws

with criminal sanctions, and was not subjected to strict scrutiny. In addition, the Court interpreted that statute to minimize any deterrent on adult access by allowing library patrons to gain unfettered access to all Internet speech without having to ask for specific access to potentially illegal content. Indeed, the case confirms that user-based filters are a less restrictive alternative to COPA. *See* discussion *infra* at 25-27.

[4] *See Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001),; *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F. 3d 1149 (10th Cir. 1999) (New Mexico); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), certifying questions to 317 F.3d 413 (Virginia); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002)*aff'd in part*, No. 02 Civ. 7785, 2003 WL 22016812 (2d Cir. Aug. 27, 2003) (Vermont); *American Civil Liberties Union v. Napolitano*, No. Civ. 00-505 TUC ACM (D. Ariz. June 14, 2002) (order granting permanent injunction) (Arizona); *Bookfriend v. Taft*, 232 F. Supp. 2d 932 (S.D. Ohio 2002) (granting temporary restraining order) (Ohio).

do not require adults to pay for speech that would otherwise have been accessible for free, or to relinquish their anonymity in order to access those materials. App. 38a.

D. COPA Is An Ineffective Means For Achieving The Government's Compelling Interest, and Less Restrictive Alternatives Are Available.

The lower court correctly concluded that COPA would be ineffective at protecting children from harmful materials, and that more effective alternatives are available to parents. App. 39a-47a. Since COPA was passed, the COPA and NRC Reports identified less restrictive alternatives consistent with the lower court's conclusions. Both independently identified a number of methods to reduce access by minors to sexually explicit material online, and both concluded that applying criminal laws to protected speech on the Internet poses significant First Amendment problems while failing to protect children effectively. *See* COPA Report, at 9, 11, 13, 25, 39; NRC Report, Executive Summary at 11-13 (summarizing alternatives); Section 14.4.3 ("in an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

Like the lower court in this case, the COPA Report found that requiring age verification systems would not be "effective at blocking access to [non Web-based] chat, newsgroups, or instant messaging." COPA Report at 27; App. 145a, ¶ 58. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for [defendant's] purpose."

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [defendant's] supposedly vital interest unprohibited.").

Moreover, the lower court correctly held that COPA is not the least restrictive means of achieving defendant's asserted interest. *See* App. 47a-48a; *see also Sable*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). The record shows, and both reports to Congress now confirm, that many alternative means are more effective at addressing minors' access to certain material. The COPA Report applauds the use of "voluntary methods and technologies to protect children," and notes that, "[c]oupled with information to make these methods understandable and useful, these voluntary approaches provide powerful technologies for families." COPA Report at 39; *see also id.* at 8, 21, 25, 27; NRC Report, Executive Summary at 10 ("filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable").

Just last term, this Court upheld another federal law mandating that public libraries and schools require use of filters on all Internet access terminals. *U.S. v. American Library Assoc.*, 123 S. Ct. 2297, 2307 (2003). Petitioner vigorously and successfully defended that statute by arguing that filters were an effective means of protecting children online. Filters, while not perfect, are clearly a less restrictive alternative to COPA's criminal ban on protected speech by adults. Having mandated their use of public libraries and schools, petitioner can no longer argue that the same option is insufficient for use by parents who wish to restrict online

viewing in the home. *See Playboy*, 529 U.S. at 805 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.")

In addition, the NRC Report highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including vigorous education and outreach to parents, teachers, librarians and other adults about Internet safety, and support for self-regulation by private parties. NRC Report at 8. This Court has repeatedly invalidated content-based burdens on adult speech when such less restrictive alternatives are available. *See Reno v. ACLU*, 521 U.S. at 879; *Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television); *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operations to scramble channels as a default).[5]

In Summary, the Third Circuit's decision fully comports with this Court's precedents and raises no unique question of constitutional law. The factual findings supporting the decision are consistent with two congressional reports, and a number of federal courts have now invalidated similar state statutes. Five years after COPA was passed and first enjoined, the government clearly has far more effective, less restrictive solutions to address its concerns. The Third Circuit correctly enjoined COPA's criminal sanctions on

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[5] Of course, as Congress has now reiterated in its two reports, Petitioner can also address its interest by vigorously enforcing other criminal statutes, such as obscenity and child pornography laws. *See* NRC Report at Section 14; *see also id.* at Section 9.1; COPA Report at 43.

protected speech for adults, and the decision does not merit this Court's review.

CONCLUSION

For all the reasons discussed above, the petition for certiorari should be denied.

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No. 03-218

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

		Page
A.	Respondents have not shown that COPA has an unjustifiably wide scope	2
B.	COPA requires material to be judged in context	3
C.	COPA incorporates an older minor standard	4
D.	The commercial purposes limitation is narrowly tailored	5
E.	The affirmative defenses are narrowly tailored	6
F.	There is no alternative to COPA that is equally effective	8

TABLE OF AUTHORITIES

Cases:

American Booksellers v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991)	4
Ashcroft v. *ACLU*, 535 U.S. 564 (2002)	2
Commonwealth v. *American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988)	4
Davis-Kidd Booksellers, Inc. v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993)	4
Ginzburg v. *United States*, 383 U.S. 463 (1966)	3
Hamling v. *United States*, 418 U.S. 87 (1974)	3
Kois v. *Wisconsin*, 408 U.S. 229 (1972)	3
Manual Enters., Inc. v. *Day*, 370 U.S. 478 (1962)	3
Penthouse Int'l, Ltd. v. *McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 477 U.S. 931 (1980)	4
Reno v. *ACLU*, 521 U.S. 844 (1997)	1, 5
Roth v. *United States*, 354 U.S. 476 (1957)	3
United States v. *American Library Ass'n*, 123 S. Ct. 2297 (2003)	8
United States v. *Armstrong*, 517 U.S. 456 (1996)	6

Constitution and statutes—Continued:	Page
U.S. Const. Amend. I	1
47 U.S.C. 230(d)	9
47 U.S.C. 231(b)(4)	2
47 U.S.C. 231(d)(1)	7
47 U.S.C. 231(e)(2)(A)	5, 6
47 U.S.C. 231(e)(2)(B)	5, 6
47 U.S.C. 231(e)(6)	3
Miscellaneous:	
H.R. Rep. No. 775, 105th Cong., 2d Sess. (1998)	4, 8, 9

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Respondents contend that review is unwarranted in this case because the court of appeals correctly held that the Child Online Protection Act (COPA) violates the First Amendment. That contention is wrong. In enacting COPA, Congress directly addressed each of the concerns that this Court identified in *Reno* v. *ACLU*, 521 U.S. 844 (1997), in holding that the Communications Decency Act of 1996 (CDA) was not narrowly tailored to further the government's compelling interests. Thus, COPA applies only to material posted on the World Wide Web. It covers only the limited number of Web communications that appeal to the prurient interest of minors, are patently offensive with respect to minors, and lack serious value for minors. It lowers the age of minority to under age 17 rather than age 18. And it applies only to those who are engaged in the business of making harmful-to-minors Web communications.

As such, COPA is narrowly tailored to further the government's compelling interest in protecting minors from the harmful effects of pornography on the Web.

Moreover, a final decision holding an Act of Congress unconstitutional should be made only by this Court. Whether minors will be afforded the protection Congress determined to be essential in COPA should not be left to the judgment of a single federal court of appeals. Indeed, this is the second time that the court of appeals has invalidated COPA. This Court reversed the court of appeals' first decision, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002), and that court's decision invalidating COPA for a second time is equally flawed. Review by this Court is therefore warranted.

A. Respondents Have Not Shown That COPA Has An Unjustifiably Wide Scope

Respondents argue that COPA covers a wide range of speech that has serious value for adults. Br. in Opp. 12-15. Respondents have failed to make that showing. From their numerous exhibits, respondents have been able to identify only five Web communications that have serious value for adults that respondents nonetheless assert are covered by COPA. Moreover, those examples are premised on respondents' erroneous view that COPA requires material to be viewed in isolation, rather than in context. See pp. 3-4, *infra*. Respondents do not assert that any of their examples would be harmful to minors when viewed in context.

Respondents also assert that COPA has an unjustifiably wide scope because it covers persons who merely host communications in chat rooms and bulletin boards. Br. in Opp. 13, 20. In fact, such persons are excluded from COPA's coverage. COPA does not apply to persons who are "engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4). Because

those who merely "host" chat rooms and bulletin boards do not "select[]" or "alter[]" the content of communications, they are excluded from COPA's coverage.

B. COPA Requires Material To Be Judged In Context

Respondents assert that COPA impermissibly requires an individual picture or writing to be viewed "in isolation" in deciding whether it is harmful to minors. Br. in Opp. 17. But COPA directs that pictures and writings must be examined "as a whole," 47 U.S.C. 231(e)(6), and, under this Court's decisions, that concept carries with it a requirement that material must be viewed in context, rather than in isolation. See *Roth* v. *United States*, 354 U.S. 476, 490 (1957); *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam). At the very least, nothing in COPA precludes the Court from interpreting COPA in that way. See *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974) (interpreting federal obscenity statute to incorporate *Miller*'s elaborate constitutional requirements, even though the statutory text did not incorporate those requirements).

Respondents express confusion on whether the relevant context includes a single image on a Web page, a single Web page, or an entire Web site. Br. in Opp. 17-18. Under this Court's decisions, individual pictures or articles in a magazine are generally examined in the context of the entire magazine. *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 489 (1962); see *Ginzburg* v. *United States*, 383 U.S. 463, 466 n.5 (1966). Similarly, under COPA, individual pictures or articles on a Web site should generally be examined in the context of the entire Web site. Thus, if an explicit work of art appears on a Web site devoted to serious art, the explicit work of art should be evaluated in the context of the entire Web site.

That does not mean that a pornographer may escape his COPA obligations by joining a series of pornographic pictures together with a series of quotations from the Bible in a single Web site. Just as obscenity law does not countenance "a sham attempt to insulate obscene material with non-obscene material," *Penthouse Int'l, Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1368 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980), COPA does not permit a sham attempt to insulate harmful material with non-harmful material.

C. COPA Incorporates An Older Minor Standard

Respondents argue that COPA is overbroad because it includes material that has "serious value" for older minors. Br. in Opp. 17. In drafting COPA, however, Congress intended to incorporate the standards from state display laws, H.R. Rep. No. 775, 105th Cong., 2d Sess. 13 (1998), and those laws have been interpreted to exclude material that has serious value for the oldest group of minors. See *American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-1505 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 533 (Tenn. 1993); *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988); Pet. 19. Accordingly, if material has serious value for reasonable 16-year-olds, it is not covered by COPA.

Respondents contend that an older minor standard is inconsistent with Congress's intent to protect younger minors from harmful material. Br. in Opp. 17. There is, however, no inconsistency. Just as state display laws protect younger minors from the harmful effects of pornographic magazines that lack serious value for older minors, COPA protects younger minors from the wide range of pornographic material on the Web that lacks serious value for older minors. In that way, COPA shields *all* minors from the most harmful material on the Web without interfering with

the interest of older minors—or adults—in obtaining access to material that has value for older minors.

Respondents argue that COPA is overbroad even if it incorporates an older-minor standard because it still would restrict access by adults to material that is harmful to minors yet not obscene. Br. in Opp. 17. But COPA cannot possibly be tailored further without eliminating its protection for minors altogether. Not surprisingly, respondents make no effort to identify any serious value standard that would be more narrowly tailored yet still serve Congress's interest in protecting minors from material that is harmful to them.

D. The Commercial Purposes Limitation Is Narrowly Tailored

Respondents err in contending that COPA's "commercial purposes" requirement does not limit its reach. Br. in Opp. 16-17. By its terms, COPA does not apply unless a person is "engaged in the business" of distributing harmful-to-minors material. 47 U.S.C. 231(e)(2)(A). Persons who do not seek to profit from harmful-to-minors material are not covered by COPA. 47 U.S.C. 231(e)(2)(B). Even persons who seek to profit from harmful material are not covered unless they seek to do so as "a regular course" of their business. *Ibid.* COPA's commercial purposes requirement therefore places a significant limitation on the reach of the Act. Indeed, in invalidating the CDA, this Court in *Reno* v. *ACLU* emphasized that the CDA was not limited to commercial pornography. 521 U.S. at 856, 865, 877. COPA directly responds to that concern.

Respondents argue that COPA is overbroad because it applies to businesses that do not post harmful material as a principal part of their business as well as businesses that seek to profit through sales of advertising space rather than the sale of harmful material itself. Br. in Opp. 16-17. Had

Congress limited COPA in the manner suggested by respondents, however, it would have created an enormous loophole. Under respondents' approach, Web businesses that market themselves as pornography vendors would be exempt, as long as they carefully limit the amount of harmful material on their Web sites to just under the amount necessary to make it the principal part of their business. Similarly, Web businesses that post nothing but pornographic pictures and advertising on their sites would be exempt as long as they seek to profit from advertising revenue rather than through sale of the pictures. Congress was not required to so seriously compromise its goal of protecting minors from harmful material.

Respondents err in asserting that a person would be liable under COPA if he posted just one Serrano photograph on the Artnet Web site or just one "Sexpert Opinion" column on the Salon Web site. Br. in Opp. 17. Taking COPA's "in context" requirement into account, neither would be harmful to minors. In any event, a person who makes a single harmful posting would not be "engaged in the business" of making harmful communications as a "regular course" of his business. 47 U.S.C. 231(e)(2)(A) and (B).

E. The Affirmative Defenses Are Narrowly Tailored

Respondents contend that COPA's credit card and Adult ID defenses are not narrowly tailored because they do not provide an assurance against prosecution. Br. in Opp. 19. In the present context, however, there is no constitutional difference between an assurance against prosecution and an affirmative defense. Federal prosecutors who know that a person has a valid defense will not bring criminal charges, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and persons who use Adult IDs or credit cards as screening devices will have no difficulty establishing that fact. Persons

who comply with COPA's Adult ID and credit card defenses therefore have no legitimate reason to fear prosecution.

Respondents assert that COPA's affirmative defenses are insufficient because adults will be deterred from seeking access to harmful material if they must use a credit card or Adult ID. Br. in Opp. 21. At the time of trial, however, approximately three million people possessed a valid Adult Check ID, Pet. App. 142a, and many commercial businesses required credit cards to make a purchase, *id.* at 136a. COPA also requires that businesses establish screening mechanisms that maintain the confidentiality of information collected in that process. 47 U.S.C. 231(d)(1). Thus, COPA furthers the government's compelling interest in protecting minors from harmful material without unduly burdening adult access to such material.

In that respect, as in others, COPA resembles the state display laws on which it was modeled. The courts have consistently upheld such laws even though they place a burden on adult access to harmful material. See Pet. 15 n.3. Respondents seek to distinguish state display statutes on the ground that they do not impose precisely the same burden on adult access to harmful material as COPA. Br. in Opp. 24. But state display laws undeniably impose a burden on adult access to harmful material. Some adults will avoid blinder racks for fear of public embarrassment; others will not purchase magazines in sealed wrappers because they cannot examine their contents first. And stores displaying harmful-to-minors material may pass on to their customers the costs of establishing and maintaining a blinder-rack system. Just as those burdens are reasonable in light of the compelling interest in protecting minors from harmful material, requiring adults to use Adult IDs or credit cards to obtain access to harmful material on the Web is reasonable in light of that same compelling interest.

F. There Is No Alternative To COPA That Is Equally Effective

Finally, respondents argue that filtering software is more effective than COPA in serving Congress's compelling interest in shielding minors from harmful material. Br. in Opp. 25-28. As applied to commercial Web sites in the United States, however, COPA's screening requirement is far more effective than filtering software. COPA compels such entities to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' alternative, no entity is required to install filtering software. Minors with sufficient computer skills can defeat blocking software. Pet. App. 148a. A minor's access is not restricted on a computer that lacks blocking software. *Ibid.* Software can be expensive for parents to purchase and update. H.R. Rep. No. 775, *supra*, at 19-20. And filtering software blocks access to some sites that contain no harmful material and permits access to some sites that contain such material. Pet. App. 148a, 160a.

Respondents err in relying on *United States* v. *American Library Ass'n*, 123 S. Ct. 2297, 2307 (2003), as support for blocking software alone as a sufficient alternative. Br. in Opp. 26. There, the Court upheld the Children's Internet Protection Act (CIPA), which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscentity, child pornography, and material that is harmful to minors. Nothing in the Court's decision suggests that filtering software would be as effective as COPA in protecting minors from the effects of commercial pornography on the Web.

There are also several critical differences between the use of filtering software under CIPA and respondents' proposed filtering alternative that make respondents' alternative far less effective. CIPA *requires* public libraries that receive federal Internet assistance to install filtering software.

Respondents' alternative does not require anyone to install such software. CIPA allows public libraries to use their expertise to address the inherent under- and over-inclusion of software. Respondents' alternative would require parents who lack such expertise to assume that role. CIPA imposes the financial cost of maintaining a filtering system on public libraries that receive federal assistance. Respondents would place the financial burden of purchasing and updating filtering software on parents. The filtering software scheme under CIPA therefore does not remotely resemble respondents' filtering scheme.

Respondents assert that COPA is ineffective because, unlike filtering software, it does not apply to non-Web protocols on the Internet. Br. in Opp. 25-26. But domestic commercial Web businesses display an enormous quantity of material that is harmful to minors, H.R. Rep. No. 775, *supra*, at 7, and Congress was entitled to address *that* serious problem with the most effective means available. Congress also did not ignore the dangers posed by non-Web sources of harmful material. In a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software, 47 U.S.C. 230(d), which addresses, at least to some extent, those other sources of pornography.

Thus, under COPA, COPA's screening requirement and the use of blocking software by parents work together to prevent minors from being exposed to harmful material. That scheme is significantly more effective in protecting minors from harmful material than respondents' alternative of relying solely on the availability of blocking software.

* * * * *

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 2003

(9)

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QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are set forth in the petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	15
Argument:	
The Child Online Protection Act is consistent with the First Amendment	18
I. COPA is narrowly tailored to further the government's compelling interest in protecting minors from harmful material on the World Wide Web	18
A. The government has a compelling interest in shielding minors from harmful material on the Web	18
B. COPA satisfies *Reno* v. *ACLU's* narrow tailoring requirements	20
C. COPA shares the characteristics of state harmful-to-minor laws that have been upheld	22
II. The court of appeals erred in holding that COPA is not narrowly tailored	26
A. COPA requires material to be viewed in context	26
B. COPA excludes material that has serious value for the oldest minors	29
C. The commercial purposes limitation is narrowly tailored	32
D. COPA's affirmative defenses are narrowly tailored	35
E. There is no alternative to COPA that is equally effective	39

Table of Contents—Continued: Page

III. COPA is not substantially overbroad 42
Conclusion 44

TABLE OF AUTHORITIES

Cases:

American Booksellers Ass'n v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990) 24
American Booksellers v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991) 24-25, 30, 31
Ashcroft v. *ACLU*, 535 U.S. 564 (2002) 4, 5, 10, 11, 42
Commonwealth v. *American Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1988) 23, 24, 27, 30, 31
Crawford v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997) 24
Davis-Kidd Booksellers, Inc. v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993) 25, 30, 31
Evans v. *United States*, 504 U.S. 255 (1992) 31
Ginsberg v. *New York*, 390 U.S. 629 (1968) 4, 18, 19, 22, 23, 27, 36, 37
Ginzburg v. *United States*, 383 U.S. 463 (1966) 28
Hamling v. *United States*, 418 U.S. 87 (1974) 28
Kois v. *Wisconsin*, 408 U.S. 229 (1972) 27, 29
M.S. News Co. v. *Casado*, 721 F.2d 1281 (10th Cir. 1983) 25
Manual Enters., Inc. v. *Day*, 370 U.S. 478 (1962) 28
Miller v. *California*, 413 U.S. 15 (1973) 4, 10, 11
Reno v. *ACLU*, 521 U.S. 844 (1997) ..... *passim*
Roth v. *United States*, 354 U.S. 476 (1957) 26, 27
Sable Communications of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989) 2, 18
United States v. *American Library Ass'n*, 123 S. Ct. 2297 (2003) 37, 38

Cases—Continued: Page

United States v. *Armstrong*, 517 U.S. 456 (1996) 39
United States v. *Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) 18, 40
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 28, 31
Upper Midwest Booksellers Ass'n v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986) 25
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 23
Virginia v. *Hicks*, 123 S. Ct. 2191 (2003) 43

Constitution and statutes:

U.S. Const.:
Amend. I ..... *passim*
Amend. V 8
Child Online Protection Act, Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231 note) 3, 6, 7, 40
Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, § 1(a)(4), 114 Stat. 2763A-335 38
Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133 2
47 U.S.C. 223(b) 2
47 U.S.C. 223(d) 2
47 U.S.C. 230(d) 41
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47 U.S.C. 231(c)(1) 4, 5, 35
47 U.S.C. 231(d)(1) 36
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47 U.S.C. 231(e)(2)(A) 3, 13, 32
47 U.S.C. 231(e)(2)(B) 3, 13, 32
47 U.S.C. 231(e)(6) 4, 12, 26, 27
47 U.S.C. 231(e)(6)(A) 6, 21
47 U.S.C. 231(e)(6)(B) 5, 21
47 U.S.C. 231(e)(6)(C) 6

Statutes—Continued: Page

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In the Supreme Court of the United States

No. 03-218

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 322 F.3d 240. An earlier opinion of the court of appeals (Pet. App. 67a-105a) is reported at 217 F.3d 162. The opinion of the district court (Pet. App. 106a-166a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting a temporary restraining order (Pet. App. 167a-180a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2003. A petition for rehearing was denied on May 13, 2003 (Pet. App. 181a-182a). The petition for a writ of certiorari was filed on August 11, 2003, and was granted on October 14, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to the certiorari petition. Pet. App. 183a-191a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(b), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d). In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869 (quoting *Sable Communication of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)). It concluded, however, that the CDA was not narrowly tailored to further that compelling interest. *Id.* at 879.

b. Congress reexamined the problem of minors' access to sexually explicit material on the Internet in

light of this Court's decision in *Reno* v. *ACLU*. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231 note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of [his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is

designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 631-633, and *Miller*, 413 U.S. at 24; see *Ashcroft* v. *ACLU*, 535 U.S. 564, 570 (2002); H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require that such materials be placed in a blinder rack, in a sealed opaque wrapper, or behind the counter. *Id.* at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1).

c. In crafting COPA, Congress addressed the specific concerns raised by this Court when it invalidated the CDA. H.R. Rep. No. 775, *supra*, at 12; S. Rep. No. 225, *supra*, at 2; see *Ashcroft* v. *ACLU*, 535 U.S. at 569; *id.* at 578 (plurality opinion of Thomas, J.); *id.* at 591 (Kennedy, J., concurring in the judgment). First, the CDA applied to communications through e-mail, newsgroups, and chat rooms, and age screening was not technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, responds to those concerns by identifying the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and is limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA addresses

that problem by imposing its requirements only with respect to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to noncommercial entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. COPA, on the other hand, applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.

Finally, COPA reduces the age of minority from under age 18 to under age 17. It also makes clear that, unlike the CDA, parents do not violate COPA when they permit their minor children to use the family computer to view material covered by the Act. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

d. Congress made legislative findings that explain the basis for COPA. It found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has

developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

The House Report accompanying COPA further documents the serious problem that Congress sought to address. By 1998, the number of minors using the Internet had grown to 16 million. H.R. Rep. No. 775, *supra*, at 9. At the same time, the number of pornography Web sites had grown to 28,000. *Id.* at 7. Those sites offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. *Id.* at 10. Because Web software is easy to use, "minors who can read and type are capable of conducting Web searches as easily as operating a television remote." *Id.* at 9-10. As a result, pornographic material on the Internet is "widely accessible" to minors. *Id.* at 9. While many minors deliberately search for pornographic Web sites, others accidentally stumble upon them. *Id.* at 10. Many pornographic sites use "copycat" Web addresses to take advantage of innocent mistakes. For example minors would find hard-core pornography by mistyping www.whitehouse.com rather than www.whitehouse.gov. *Ibid.* Searches using common terms such as toys, girls, boys, bambi, and doggy all lead to pornographic sites. *Ibid.* Most pornographic Web sites either provide no warning that their sites contain

pornography or provide a warning on the very same Web page that displays pornographic teasers. *Ibid.*

2. a. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. Pet. App. 114a-115a. The district court entered a preliminary injunction preventing enforcement of the Act, reasoning that COPA likely violates the First Amendment. *Id.* at 164a- 166a.

Many of the district court's findings support COPA's constitutionality. The district court found that pornographic material is widely available on the Web and that minors can readily obtain access to it. Pet. App. 156a. The court also found that readily available adult identification systems enable Web site operators to prevent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web operators can place harmful material behind screens that allow access to the material only when the user provides a valid credit card number. *Id.* at 138a-140a. The court found that a Web operator could establish a credit card verification system for $300 and could perform a verification check of each individual viewer for $.15 to $.25 per year. *Ibid.*

The court also noted that one company, Adult Check, provides (at no cost to the Web business) a script that can be placed anywhere the Web operator wishes to prevent access by minors. Pet. App. 141a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase an

adult personal identification (adult ID) for $16.95, return to the original site, and use the ID to obtain access to the site. *Id.* at 141a-142a. The court cited testimony that approximately three million people possess a valid Adult Check ID, and 46,000 Web sites accept them. *Id.* at 142a. The court also found that Web operators can segregate the harmful material from their sites behind age verification screens, leaving other material on the site to be viewed by all users. *Id.* at 138a, 143a.

The district court nonetheless determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. Pet. App. 156a. The court found that respondents were likely to establish at trial that the placement of adult screens in front of material that is harmful to minors "may deter" users from seeking access to such materials, that the loss of users "may affect" Web businesses' economic ability to provide such communications, and that Web site operators and content providers "may feel" an economic disincentive to display material that is or may be considered harmful to minors. *Id.* at 155a-156a.

The district court also concluded that the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to harmful material without imposing the same burden on constitutionally protected speech. Pet. App. 160a. The court acknowledged that software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 148a, 160a. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that

minor] accesses the Web from an unblocked computer." *Id.* at 148a. The court found it more significant, however, that software can block material on foreign Web sites and material outside the Web, and that some minors may be able to obtain access to credit cards and adult IDs and thereby obtain access to harmful-to-minor material despite the screening mechanisms provided for in COPA's affirmative defenses. *Id.* at 148a, 159a.

b. The court of appeals affirmed on a different ground. Pet. App. 67a-105a. It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA facially unconstitutional, because it effectively requires Web businesses to comply with the community standards of the least tolerant community. *Id.* at 69a.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585.

In a plurality opinion, Justice Thomas, joined by the Chief Justice and Justice Scalia, concluded that "[b]ecause Congress has narrowed the range of content restricted by COPA in a manner analogous to [the] definition of obscenity" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment." 535 U.S. at 584-585.

Justice O'Connor concurred in part and concurred in the judgment. 535 U.S. at 586-589. She agreed with the plurality that "even under local community standards, the variation between the most and least restrictive communities is not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad." *Id.* at 586. She nonetheless concluded that COPA should be interpreted to incorporate a "national standard." *Id.* at 587.

Justice Breyer also concurred in part and concurred in the judgment. 535 U.S. at 589-591. He concluded that Congress intended the term "community standards" to refer to a national standard, *id.* at 590, and that any regional variations in the application of that standard "are not, from the perspective of the First Amendment, problematic." *Id.* at 591.

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, concurred in the judgment. 535 U.S. at 591-602. They concluded that it cannot be known "whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech." *Id.* at 597.[1]

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunction. Pet. App. 1a-66a.

a. Based on several considerations, the court held that COPA does not withstand scrutiny under the First Amendment. Pet. App. 19a-49a. The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the

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[1] Justice Stevens dissented. 535 U.S. at 602-612. He concluded that COPA's use of community standards to identify material harmful to minors renders the statute facially unconstitutional. *Ibid.*

prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions, the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. *Id.* at 21a-22a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." Pet. App. 22a.

The court next concluded that use of the term "minors" in the harmful-to-minors definition is not narrowly drawn to achieve the statute's purpose. Pet. App. 27a-28a. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web businesses cannot know which minors should be considered in deciding whether material appeals to the prurient interest, is patently offensive, and lacks serious value. Pet. App. 24a-25a. The court rejected the government's argument that the question under COPA is whether material appeals to the prurient interest of, is patently offensive with respect to, and lacks serious value for, older minors. *Ibid.* In doing so, the court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, *id.* at 25a-26a n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. *Id.* at 25a-27a. The court further concluded that even if COPA incorporates the

normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." *Id.* at 28a.

The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow the statute's reach. Pet. App. 28a. The court criticized COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material even if they do not post such material "as the principal part of their business" and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. *Id.* at 29a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from the distribution of harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." Pet. App. 31a.

The court of appeals next held that while COPA affords an affirmative defense to Web site operators that use credit cards or adult IDs to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected material. Pet. App. 32a-38a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is

sensitive or controversial." *Id.* at 35a. The court also regarded COPA's affirmative defenses as deficient because, while they furnish protection against conviction, they do not provide Web site operators "with assurances of freedom from prosecution." *Id.* at 36a-37a.

In addition to finding COPA not to be narrowly tailored, the court determined that COPA does not employ the least restrictive means to further the compelling interest in protecting minors. Pet. App. 38a-48a. For the reasons given by the district court, the court of appeals concluded that filtering software "may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material." *Id.* at 47a. The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." *Id.* at 48a.

b. Relying on the same considerations that led it to conclude COPA is not sufficiently tailored to satisfy strict scrutiny, the court of appeals held that COPA is substantially overbroad. Pet. App. 49a- 60a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." *Id.* at 58a. And, relying on the same considerations that led it to conclude that COPA's definition of "minor" is not narrowly tailored, the court invalidated that definition as unconstitutionally vague. *Id.* at 55a n.37.

Finally, the court concluded that it could not give COPA a narrowing construction that would render it constitutional. Pet. App. 59a. The court therefore affirmed the district court's preliminary injunction against any enforcement of COPA. *Id.* at 60a.

SUMMARY OF ARGUMENT

I. The Child Online Protection Act is narrowly tailored to further the government's compelling interest in shielding minors from material that is harmful to them. It therefore does not violate the First Amendment.

A. There is a compelling governmental interest in protecting minors from the effects of material that is not obscene by adult standards, but that is nonetheless harmful to minors. The Web poses a serious threat to that compelling interest. Thousands of Web businesses display numerous free pornographic depictions that are harmful to minors, and that material is readily accessible to minors of all ages.

B. COPA is narrowly tailored to address that serious problem. COPA specifically responds to the narrow tailoring concerns that led this Court to invalidate the CDA. COPA applies only to material on the World Wide Web. It applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. It defines with particularity the kinds of depictions that may be deemed patently offensive. And it applies only to Web operators that regularly distribute harmful material in order to generate a profit.

C. COPA also shares the essential characteristics of state laws that prohibit the public display of harmful material in places where minors may be present. Like those laws, COPA shields minors from the effects of material that is harmful to them, without imposing an undue burden on adult access to that material. Indeed, COPA's principal effect is to require Web businesses that already display their sale material behind age

verification screens to put their free material behind those screens as well.

II. The court of appeals' conclusion that COPA is not narrowly tailored is based on a misinterpretation of COPA's scope and a misapplication of First Amendment principles.

A. The court of appeals erred in holding that COPA requires material to be viewed in isolation. COPA directs communications to be viewed "as a whole," and that direction means that communications must be viewed in the context in which they are presented. In general, that context would include the entire Web site.

B. The court of appeals further erred in holding that Web businesses cannot know the age of the minors for whom material must have serious value. Congress expressly modeled COPA on state harmful-to-minor laws, and those laws had been construed to apply only to material that lacks serious value for the oldest group of protected minors. Thus, material lacks serious value for minors under COPA when it lacks serious value for normal 16-year olds.

C. The court of appeals' criticisms of the commercial purposes limitation are misguided. If, as suggested by the court of appeals, Congress had limited COPA to businesses that are primarily devoted to harmful material, or to businesses that derive profits from sales rather than advertising, serious loopholes in COPA's protection would have been created. Under such a statute, businesses that market themselves as pornography vendors would have escaped regulation as long as the sale of pornography were not the principal part of their business. Similarly, Web businesses that post nothing but pornography and advertisements on the their sites would not be covered as long as they derived profits from advertising revenue rather than from the

sale of the material itself. Congress was not required to compromise so seriously its goal of protecting minors from harmful material.

D. Nor do COPA's affirmative defenses place an undue burden on adult access to harmful material. Adults need only use an adult ID or a credit card to obtain access to such material. Millions of adults already use adult Ids and credit cards on the Web. And proof of age is a standard way to obtain access to material that is harmful to minors in nightclubs, adult book stores, and movie theaters.

E. The court of appeals also erred in holding that filtering software is a sufficient alternative to COPA's mandatory screening requirement. Filtering software is not nearly as effective as COPA's screening requirement in shielding minors from commercial domestic pornography on the Web. Filtering software is voluntary, while COPA's screening requirement is mandatory. Filtering software also blocks some sites that are not harmful; it fails to block some sites that are harmful; it can be expensive for parents to purchase; and it quickly becomes outdated. Congress also did not view mandatory screening and blocking software as an either or choice. It mandated screening and encouraged the use of blocking software as well. That combined approach is far more effective than the use of voluntary blocking software alone.

III. COPA is also not substantially overbroad. The court of appeals identified only three valuable Web communications that it believed were arguably covered by COPA, and under the correct interpretation of COPA, none of those examples is covered.

ARGUMENT

THE CHILD ONLINE PROTECTION ACT IS CONSISTENT WITH THE FIRST AMENDMENT

I. COPA IS NARROWLY TAILORED TO FURTHER THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING MINORS FROM HARMFUL MATERIAL ON THE WORLD WIDE WEB

The Child Online Protection Act regulates expression that is not constitutionally protected for minors, but that is constitutionally protected for adults. COPA reasonably regulates such expression on the basis of its content, in order to achieve its purpose of protecting minors. But because it regulates on the basis of content, COPA "must be narrowly tailored to promote a compelling government interest" in order to be constitutional under the First Amendment. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). COPA satisfies that standard. The government has a compelling interest in shielding minors from the harmful effects of pornography on the Web, and COPA is narrowly tailored to achieve that interest.

A. The Government Has A Compelling Interest In Shielding Minors From Harmful Material On The Web

The Court has repeatedly held that the government has a compelling interest in protecting minors from pornographic material that is not obscene by adult standards, but that is nonetheless harmful to minors. *Reno* v. *ACLU*, 521 U.S. 844, 864-865 (1997); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). That compelling interest has two components. First, the government has an interest in aiding parents who wish to protect their children from the harmful effects

of pornographic material. *Ibid.* Second, the government has an independent interest in the well being of the Nation's minors. *Id.* at 640; *Reno* v. *ACLU*, 521 U.S. at 865.

The pornography on the Web poses a serious threat to those compelling government interests. There are thousands of pornographic sites on the Web that offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 7, 10. Minors today can search the Web as easily as they can change television channels. *Id.* at 9-10. Thus, in the seclusion of their homes or those of friends, unsupervised minors can, with the click of a mouse, visit one pornographic site after another, and view and then print one set of pornographic teasers after another. There is also a serious risk that minors will be inadvertently exposed to pornographic material. *Id.* at 9. Pornography businesses use copycat addresses, such as "Whitehouse. com," to lure unsuspecting viewers to their sites, and common search terms such as "girls," "toys," and "bambi" lead to pornographic sites. *Ibid.*

In the years since COPA has been enjoined, the problem has grown worse. The number of minors who use the Internet has increased dramatically. As of 2001, more than two-thirds of the minors between the ages of nine and 17 were using the Internet, and more than one-quarter of the minors between the ages of three and eight were doing so. National Telecommunications and Info. Admin., *A Nation Online: How Americans are Expanding Their Use of the Internet*, Tables 2-2 to 2-3 (Feb. 2002) <http://www.ntia.doc.gov/ntiahome/dn/>. At the same time, pornographic Web businesses have developed more sophisticated techniques for luring viewers to their sites: They send

unsolicited e-mail (known as "spam"), pay search engine companies for more prominent placement, acquire expired domain names that have a reputation for generating traffic, and pay other Web sites to obtain their exit traffic (known as "mouse trapping"). National Research Council, *Youth, Pornography, and the Internet* 74 (Dick Thornburgh & Herbert S. Lin eds., 2002). The results are disturbing. Based on data compiled in a report commissioned by Congress, approximately 70 million different individuals visit pornographic Web sites each week, and 16% of those visitors —approximately 11 million—are under the age of 18. *Id.* at 72, 78. Surveys show that 25% of minors between the ages of 10 and 17 who regularly use the Internet inadvertently viewed pornography in the prior year. *Id.* at 132-133. Of minors between the ages of 15 and 17, 70% have viewed pornography inadvertently. *Id.* at 133. The government has a compelling interest in addressing those serious problems.

B. COPA Satisfies *Reno* v. *ACLU*'s Narrow Tailoring Requirements

Based on guidance this Court provided in *Reno* v. *ACLU*, *supra*, Congress narrowly tailored COPA to further the government's compelling interest in shielding minors from pornography on the Web. Thus, unlike the CDA, COPA satisfies the First Amendment's narrow-tailoring requirement.

In holding the CDA unconstitutional, the Court identified several flaws that together rendered the CDA insufficiently tailored to the government's compelling interest in protecting minors from harmful material. First, the CDA applied to e-mail, newsgroups, and chat rooms, where screening through the use of credit cards and adult IDs was not feasible. *Reno*

v. *ACLU*, 521 U.S. at 851, 876-877. Second, the CDA prohibited the display or transmittal of material that was "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Id.* at 871 & n.37, 873, 877. Third, the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, leading to the coverage of vast amounts of valuable material. *Id.* at 873, 877-878. And fourth, the CDA applied to noncommercial entities and to individuals posting messages on their own computers who might not be able to afford the cost of screening. *Id.* at 856, 865, 877.

COPA successfully addresses each of those concerns. COPA applies only to material posted on the Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14. COPA identifies the particular types of sexually explicit depictions and descriptions that may be considered patently offensive, and it is expressly limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B). COPA is narrowly limited to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C). And COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Thus, COPA cures the CDA's flaws

and satisfies *Reno* v. *ACLU*'s narrow tailoring requirements.[2]

C. COPA Shares The Characteristics Of State Harmful-To-Minor Laws That Have Been Upheld

Congress modeled COPA on state harmful-to-minor laws that have been upheld as consistent with First Amendment standards. COPA's incorporation of the essential characteristics of those valid state laws further demonstrates COPA's compliance with narrow tailoring requirements.

In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a prohibition on the sale of material that was harmful to minors, but that was not obscene as to adults. The "harmful-to-minors" statute at issue in *Ginsberg* defined harmful material in terms that closely parallel COPA, including as elements of the definition an appeal to the prurient interest of minors, patent offensiveness with respect to minors, and lack of value for minors. *Id.* at 646. With that understanding of the limited reach of the statute, the Court upheld its constitutionality. The Court explained that "[t]he legislature could properly conclude" that parents who have "primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, and that "[t]he State also has an independent interest in the well-being of its youth," *id.* at 640.

At the time of *Ginsberg*, nearly every State had a prohibition on the sale to minors of harmful-to-minors

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[2] COPA also reduces the age of minority to under age 17 and makes clear that parents do not violate the Act when they permit their minor children to view covered material. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

material, 390 U.S. at 647-648, and those state laws, or slight modifications of them, remain in effect today. See Gov't Br. Addendum I, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293).

In addition to prohibiting the sale of harmful material to minors, many States also prohibit the public display of harmful material in places where minors are permitted. Gov't Br. Addendum II, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293). This Court was presented with a facial challenge to one such law in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). The statute at issue in *American Booksellers* made it unlawful to display material that was "harmful to juveniles" in a manner that permitted juveniles to examine and peruse the material, and defined "harmful to juveniles" in much the same way that the statute in *Ginsberg* defined "harmful to minors." *Id.* at 386-387. In this Court, the plaintiffs argued that the display prohibition applied to as much as 25% of a typical bookseller's stock, and cited 16 examples of valuable works that allegedly were covered. *Id.* at 390. The State, by contrast, argued that the law covered only "a very few 'borderline' obscene works," and none of the plaintiffs' examples. *Id.* at 394. This Court noted that, if the State's description of the statute's coverage was accurate, it would affect "substantially" the cost of complying with the law, and the burden on adult access to speech would be "dramatically altered." *Ibid.* Accordingly, the Court certified to the Virginia Supreme Court the question whether any of the 16 books introduced as plaintiffs' exhibits were covered by the statute. *Id.* at 398.

The Virginia Supreme Court answered the certified question in *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618 (1988), holding that none of 16 books fell within the ambit of the state statute. The

court construed the statute as not applying to works that "have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents." *Id.* at 624. The court then concluded that none of the books lacked "serious literary, artistic, political or scientific value" for that group of minors. *Ibid.* The books at issue included Alex Comfort & Jane Comfort, *The Facts of Love* (1979), and *The New Our Bodies, Ourselves* (Jane Pincus & Wendy Sanford eds., 1984). 372 S.E. 2d at 622. *The Facts of Love* contains graphic drawings of the human anatomy, and both books contain explicit, but informative, discussions of sexual acts. *Facts of Love, supra,* at 25-55; *The New Our Bodies Ourselves, supra,* at 164-197.

After the Virginia Supreme Court's decision, this Court remanded the case to the Fourth Circuit for reconsideration in light of that decision. 488 U.S. 905 (1988). On remand, the Fourth Circuit upheld the constitutionality of the statute, stating that it "agree[d] with the Virginia Supreme Court that the amendment to the statute places a minimal burden on booksellers and represents a constitutionally permissible exercise of the state's police powers." *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (1989). This Court then denied certiorari. 494 U.S. 1056 (1990).

Other courts of appeals and state courts have upheld the constitutionality of state statutes that prohibit the sale or display of harmful-to-minors material in places where minors may obtain access to the material. In particular, the courts have upheld laws that prohibit: the sale of harmful material in unsupervised sidewalk vending machines (*Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997)); the display of harmful material unless placed in blinder racks that conceal harmful content (*American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983)); the display of harmful material unless the material is sealed in an opaque cover (*Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986)); and the display of harmful material except in a blinder rack, sealed package, or an adults-only room (*Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 526-529 (Tenn. 1993)).

COPA shares the essential characteristics that make state harmful- to-minor laws constitutional. Like those laws, COPA applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. Like state harmful-to-minor laws, COPA's obligations fall on commercial businesses that seek to profit from pornographic material and that can legitimately be expected to bear the costs of compliance. Like state harmful-to-minor laws, COPA does not ban the sale of harmful-to-minors material. Instead, it requires that businesses make good faith efforts to keep such material away from minors. Finally, like the state display laws, COPA's harmful-to-minors standard does not impose an undue burden on adult access to material that is constitutionally protected for them, but not for minors. As Congress recognized, pornographic businesses already put much of their material behind age verification screens. H.R. Rep. No. 775, *supra*, at 14. COPA's principal effect is to require commercial pornographers to place their pornographic teasers behind those screens as well. COPA's harmful-to-minors standard is therefore firmly grounded in widely accepted and constitutionally sound state harmful-to-minor laws.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT COPA IS NOT NARROWLY TAILORED

The court of appeals nonetheless held that COPA is not narrowly tailored in several respects. That holding is based on a misinterpretation of COPA's key provisions and a misapplication of established First Amendment principles. Rather than interpreting COPA to avoid constitutional problems, the court interpreted COPA to create them. And rather than faithfully applying this Court's narrow tailoring principles, the court created narrow tailoring requirements that could effectively invalidate all congressional efforts to deal with harmful-to-minor materials on the Internet.

A. COPA Requires Material To Be Viewed In Context

COPA specifies that material is not harmful to minors unless the material, "taken as a whole," appeals to the prurient interest of minors and lacks serious value for minors. 47 U.S.C. 231(e)(6). Despite COPA's directive to examine material "as a whole," the court of appeals concluded that COPA requires particular Web postings to be evaluated "in isolation, rather than in context." Pet. App. 22a. Based on that interpretation, the court of appeals held that COPA is not narrowly tailored. The court erred in interpreting COPA to require material to be viewed in isolation, rather than in context.

1. The term "as a whole" has its source in this Court's obscenity decisions, and, in that setting, carries with it the requirement that material be judged in context, rather than in isolation. In *Roth* v. *United States*, 354 U.S. 476, 490 (1957), the Court approved the following jury instruction on the "as a whole" requirement:

> The test in each case is the effect of the book, picture or publication considered as a whole. * * * The books, pictures and circulars must be judged as a whole, *in their entire context*, and you are not to consider detached or separate portions in reaching a conclusion.

Id. at 490 (emphasis added). In *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam), the Court held that, under *Roth*'s "as a whole" requirement, a "reviewing court must, of necessity, look at the context of the material, as well as its content." Thus, when COPA specifies that material is covered by COPA only when, "taken as a whole," it appeals to the prurient interest of minors and lacks serious value for minors, that means that particular communications are covered by COPA, only when, *in the context in which they are presented*, the communications appeal to the prurient interest of minors and lack serious value for minors.

In concluding otherwise, the court of appeals relied on COPA's description of harmful material as "*any* communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." Pet. App. 65a (quoting 47 U.S.C. 231(e)(6)) (emphasis added). But considering a particular picture or communication "as a whole" is fully consistent with examining it in the context in which it is presented, rather than in isolation. Indeed, the harmful-to-minors laws on which COPA was modeled described harmful material as "*any* description or representation" that is harmful to minors, *Ginsberg*, 390 U.S. at 646 (emphasis added); *American Booksellers*, 372 S.E.2d at 621 (emphasis added), and one of the obscenity statutes examined in *Roth* referred to "*any* obscene or indecent writing, * * * picture or print," 354 U.S. at 479-480 n.3

(emphasis added). Just as particular pictures and descriptions were to be considered in context under those statutes, they are to be so considered under COPA.

Furthermore, the Court has not hesitated to interpret federal statutes to embody constitutionally required standards even when those standards do not emerge from the most natural reading of the statutory text and, indeed, even when the standards are not set forth in the text at all. In *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974), the Court interpreted the federal obscenity statute to incorporate *Miller*'s constitutional requirements, even though the statutory text did not incorporate those requirements. The Court applied the principle that federal statutes should be interpreted to incorporate constitutional requirements so long as such a reading is not plainly contrary to the intent of Congress. *Id.* at 113. Accord *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Thus, even if COPA's "in context" requirement did not emerge so clearly from COPA's "as a whole" text, *Hamling* would compel adoption of that interpretation.

2. Here, as in other settings, there is no universal rule for applying the "in context" requirement. In general, however, individual pictures or articles should be examined in the context of an entire Web site. Many Web sites may be analogized to magazine, and, under this Court's decisions, individual pictures or articles in magazines are ordinarily examined in the context of the entire magazine. *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 489 (1962); *Ginzburg* v. *United States*, 383 U.S. 463, 466 n.5 (1966). That approach is also consistent with the principle that federal statutes should be interpreted to avoid constitutional difficulties. Thus, if an explicit work of art appears on a Web site devoted to serious

art, the explicit work of art should be evaluated in the context of the entire Web site.

That does not mean that a pornographer may escape his COPA obligations by inserting quotations from Voltaire onto a Web site that is devoted to pornographic depictions. The quotations, in that setting, would not provide relevant context—or would not redeem the character of the Web site—any more than such quotations would do so for a book or magazine devoted to obscenity. *Kois*, 408 U.S. at 231 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."). Similarly, if a Web site that contains a variety of material invites persons to "click for xxx pictures" and persons who click are diverted to a portion of the Web site that contains pornographic material, that highlighting feature would be an important part of the context in which the pornographic material was presented. There may also be other circumstances where the actions of the business displaying the communications has a distinct bearing on the context in which the material is displayed. That approach fully satisfies constitutional narrow tailoring requirements.

B. COPA Excludes Material That Has Serious Value For The Oldest Minors

The court of appeals also held that COPA is not narrowly tailored based on its view that Web businesses cannot know which minors should be considered in deciding whether material lacks serious value for minors. Pet. App. 24a. That criticism is misguided. Material is not covered by COPA unless it lacks serious value for all protected age groups, including the oldest

group of minors. Thus, material that has serious value for normal 16-year-olds is not covered by COPA.[3]

The background and text of COPA compel that interpretation. Before COPA was enacted, courts had interpreted state display laws to incorporate an older-minor standard. In *American Booksellers Ass'n*, 372 S.E.2d at 624, at the urging of Virginia's Attorney General, the Virginia Supreme Court held that material has serious value for minors and therefore is not subject to the State's display law if it has serious value for a "legitimate minority of normal, older adolescents." The court explained that "if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Ibid.* In *Davis-Kidd*, the Tennessee Supreme Court held that material has serious value for minors within the meaning of that State's display law if it has serious value for "a reasonable seventeen year old minor." 866 S.W.2d at 533. In *Webb*, the Eleventh Circuit interpreted Georgia's display law in the same way. 919 F.2d at 1504-1505.

Against that background, Congress adopted language that mirrors the language of the state display laws. That choice of language was not accidental. In order to make sure that its standard was sufficiently precise and administrable, Congress deliberately borrowed the "familiar" definition of "harmful to minors" as that standard had been applied in the context of state display laws "over the years." H.R. Rep. No. 775, *supra*, at 13 (citing cases). Because Congress modeled COPA on the state display laws and deliberately incorporated

[3] That older minor standard also applies to COPA's prurient interest and patent offensiveness inquiries.

their harmful to minors definitions, COPA should be construed to incorporate the older minor standard reflected in those state display laws. *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992). That interpretation is also supported by the principle that federal statutes should be interpreted to avoid constitutional questions, rather than to create them. *X-Citement Video, Inc.*, 513 U.S. at 78.

The court of appeals concluded that COPA cannot be construed to incorporate an older-minor standard because COPA defines minor as "any person under 17 years of age." 47 U.S.C. 231(e)(7). But the state display laws cited above had similar definitions. *American Booksellers*, 372 S.E.2d at 621; *Davis-Kidd*, 866 S.W.2d at 534; *Webb*, 919 F.2d at 1513. COPA's definition of minors therefore provides no basis for departing from the settled understanding that material lacks serious value for minors as a class only when it lacks serious value for all protected age groups, including the oldest protected group.

The court of appeals also believed that an older minor standard is inconsistent with Congress's intent to protect younger minors from harmful material. Pet. App. 25a. There is, however, no inconsistency. Just as the obscenity component of COPA protects younger minors from the harmful effects of pornography that lacks serious value even for adults, the harmful-to-minors component of COPA protects younger minors from the harmful effects of pornography that lacks serious value for the oldest minors. In that way, COPA shields *all* minors from the most harmful material on the Web, without interfering with the interest of older minors in obtaining access to material that has serious value for them. In that respect as in others, COPA operates in the same way as state display laws: both

protect all minors from the harmful effects of pornography that lacks serious value for older minors.

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny." Pet. App. 27a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Not surprisingly, the court of appeals expressly refused to "suggest how Congress could have tailored its statute" in any other way. *Ibid.*[4]

C. The Commercial Purposes Limitation Is Narrowly Tailored

COPA's commercial purposes definition limits COPA's obligations to persons "engaged in the business" of distributing harmful-to-minors material. 47 U.S.C. 231(e)(2)(A). Persons are "engaged in the business" only if they seek to profit from such material, and even businesses that seek to profit from harmful material are not covered unless they do so as "a regular course" of their business. 47 U.S.C. 231(e)(2)(B).

Those limitations are significant. Unlike the CDA, COPA excludes from coverage individuals posting messages on their own computers. It also excludes businesses that only occasionally provide harmful material. COPA thus narrowly limits its obligations to businesses that regularly seek to profit from harmful material. Such entities can legitimately be expected to

[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." Pet. App, 55a-56a n.37. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

absorb the costs of ensuring that their communications do not harm minors.

The court of appeals viewed the commercial purposes limitation as insufficient because Web businesses are covered even when they seek to profit through sales of "advertising space" rather than the sale of harmful material itself, and even when they do not post harmful material as a "principal part" of their business. Pet. App. 29a. Congress was not required to limit the Act's protections in the manner suggested by the court of appeals.

Congress had ample justification for extending COPA's obligations to businesses that seek to profit from harmful material by selling advertising space. Congress's authority to regulate effectively should not depend on a commercial pornographer's business model. A common method of doing business on the Web is to charge for advertising, and some commercial pornographers generate revenue in precisely that way. *Youth, Pornography, and the Internet*, *supra*, at 73, 75, 76. When such businesses post harmful material as a regular course of their business, they pose just as much of a threat to minors as businesses that post harmful material in order to sell it to consumers. Under the court of appeals' proposal, Web businesses that post nothing but pornographic pictures and advertising on their sites would be exempt as long as they seek to profit from advertising revenue rather than through sale of the pictures. Congress was not required so seriously to compromise its goal of protecting minors from harmful material.

Another significant loophole would have been created had Congress limited COPA's scope to businesses that post harmful material as a principal part of their business. Under that approach, Web businesses that ex-

pressly market themselves as pornography vendors would be exempt from the reach of the law, as long as they carefully limit the amount of harmful material on their Web sites to just under the amount necessary to make it the "principal part" of their business. COPA's commercial purposes definition closes that loophole and ensures that minors receive the protection they need. COPA's definition also avoids the significant practical difficulty that would arise from any attempt to define and calculate whether a Web business has posted harmful material as a "principal part" of its business.

The court of appeals expressed concern that, without such a limitation, COPA would impose obligations on Web businesses that are primarily devoted to the distribution of material that has serious value for minors, but that regularly include a single column that is harmful to minors. The court gave as an example a hypothetical Web site that deals primarily with medical information but also regularly publishes a bi-weekly column devoted to sexual matters.

The courts's concern is unfounded. A serious column on sexual matters on a medical Web site would not be harmful to minors, particularly in the context of that Web site. On the other hand, should a Web business that is primarily devoted to providing medical information display a bi-weekly column of sexually explicit pornography that is harmful to minors even when viewed in the context of a medical Web site, and should that Web business seek to profit from that regular pornographic display, there is no reason that it should be exempt from COPA's requirements. At that point, that Web business may reasonably be required to place that one bi-weekly pornographic column behind an age verification screen, leaving the rest of the site open for public viewing.

D. COPA's Affirmative Defenses Are Narrowly Tailored

COPA provides "an affirmative defense to prosecution" for businesses that restrict access by minors to harmful material by requiring use of a credit card or an adult ID. 47 U.S.C. 231(c)(1). That defense allows adults to obtain access to material that they have a constitutional right to receive, while protecting minors from material that is harmful to them. The court of appeals held that COPA's affirmative defenses are not narrowly tailored, reasoning that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." Pet. App. 35a. That analysis is seriously flawed.

1. The record in this case demonstrates that requiring an adult to present an adult ID or a valid credit card number is not an unreasonable burden. At the time of trial, approximately three million people possessed a valid Adult Check ID, Pet. App. 142a, and many commercial Web sites, such as Amazon.com, require a credit card to make a purchase, *id.* at 136a. Moreover, many popular Web sites require users to provide identifying information. The *Wall Street Journal* requires a paid subscription, J.A. 73, 580, eBay requires street address and phone number, J.A. 297, 581, and respondent Salon.com requires registration to obtain access to certain areas of its site. J.A. 77. If people are willing to use credit cards or adult IDs and provide identifying information for their own purposes, they reasonably can be called upon to do the same under procedures that are required to achieve the

compelling interest in protecting minors from harmful material.

Providing proof of age is also common in other contexts in which there is an interest in protecting minors. Proof of age is often a prerequisite for entry to a nightclub, an adult book store, or an NC-17 movie. See *Reno* v. *ACLU*, 521 U.S. at 890 (O'Connor, J., concurring in part and dissenting in part) (noting that the adult verification requirement is "much like a bouncer [who] checks a person's driver's license before admitting him to a nightclub").

Furthermore, COPA requires Web businesses to maintain the confidentiality of information collected for screening purposes. 47 U.S.C. 231(d)(1). The court of appeals viewed that important protection as inadequate because it believed that there are no penalties for violating the requirement of confidentiality. In fact, however, a violation of that requirement is punishable by a fine of up to $10,000 or imprisonment for up to one year. 47 U.S.C. 501.

2. The court of appeals not only overstated COPA's burdens; it also mistakenly viewed any burden on adult access to constitutionally protected material as a per se violation of the First Amendment. In order to further the compelling interest in protecting minors from harmful material, the First Amendment permits reasonable burdens to be imposed on adult access to such material.

This Court's decision in *Ginsberg* is instructive. In that case, the Court upheld a requirement that store owners make a good faith effort to ascertain the age of a customer purchasing harmful material. 390 U.S. at 643-644. In order to fulfill that obligation, stores owners would have to ask some youthful-looking adults for proof of age, even though making that request

would deter some adults from purchasing the material. The Court also upheld a requirement that a store owner must, in certain circumstances, make efforts to ascertain whether material is harmful to minors. *Ibid.* Faced with that concern, some store owners might choose not to sell items that have not been reviewed or cease selling publications that require such a review.

The decisions upholding state harmful-to-minor laws also rest on the principle that the First Amendment permits the government to impose reasonable conditions on adult access to harmful material in order to shield minors from that material. All of those laws impose burdens that may deter some adults from seeking access to harmful material or deter some businesses from providing it. Some adults may be unwilling to purchase harmful material when unsupervised vending machines are unavailable. Some adults may steer clear of blinder racks for fear of public embarrassment. Others may be disinclined to purchase magazines in sealed opaque wrappers because they cannot peruse them first. Still others may not purchase harmful material because they are unwilling to provide proof of age. Faced with the costs of compliance and a possible loss in sales, some stores may decide not to carry harmful material. Others may pass on to their customers the costs of establishing and maintaining a system that prevents minors from obtaining access to such material. Just as those burdens do not invalidate state display laws, the modest burdens associated with COPA fall well within constitutional limits.

This Court's recent decision in *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003), also shows that the First Amendment permits reasonable conditions to be imposed on adults in order to further the compelling interest in protecting minors. In that

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case, the Court upheld the constitutionality of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, § 1(a)(4), 114 Stat. 2763A-335, which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscenity, child pornography, and material that is harmful to minors. The Court rejected the district court's conclusion that CIPA violates the First Amendment because it requires adults to ask library personnel to unblock certain Web sites and adults may be too embarrassed to make such a request. A plurality of the Court stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." 123 S. Ct. at 2307. Justices Kennedy and Breyer similarly concluded that placing a burden on adults to request access to blocked sites does not violate the First Amendment. *Id.* at 2309 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment). Under COPA, moreover, there is no need to identify one's self in person.

Thus, requiring adults seeking pornographic material to present a valid credit card or an adult ID is a constitutionally permissible way to further the government's compelling interest in protecting minors from pornography. The harmful-to-minors material covered by COPA is not constitutionally protected for minors, even though it may be for adults. Requiring a credit card or adult ID as condition of access is a readily available and familiar mechanism for distinguishing the former from the latter.

3. Nor does it matter that a Web business's use of a screening device is an affirmative defense to prosecution, rather than an "assurance[] of freedom from prosecution." Pet. App. 36a-37a. In the present context, there is no constitutional difference between the two. Prosecutors can readily determine whether Web businesses are using credit cards or adult IDs as screening devices, and prosecutors who know that a person has a valid defense will not bring criminal charges. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (there is presumption that prosecutors will properly discharge their duties). Businesses that comply with COPA's defenses therefore have no legitimate reason to fear prosecution.

E. There Is No Alternative To COPA That Is Equally Effective

1. The court of appeals also erred in invalidating COPA on the ground that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material online." Pet. App. 40a-41a. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective. COPA *compels* Web businesses to take steps to prevent minors from obtaining access to material that is harmful to them. Under the court of appeals' alternative, no entity is required to install filtering software. Blocking software also blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. *Id.* at 148a, 160a. Minors with sufficient computer skills can defeat the blocking device. *Id.* at 148a. A minor's access is not restricted on a computer that lacks blocking software, such as a friend's computer. *Ibid.* Software can be expensive or burdensome for parents to purchase. H.R. Rep. No. 775, *supra*, at 19. And software must be updated periodically at an additional cost. *Id.* at 20.

Because of the deficiencies in blocking software, the court of appeals' reliance on this Court's decision in *Playboy* was misplaced. See Pet. App. 42a-43a. There, the less restrictive alternative identified by the Court *required* cable operators to block undesired channels upon the request of the subscriber, *at no cost* to the subscriber. 529 U.S. at 809-810, 816. Moreover, once the operator blocked the channel, it would eliminate *entirely* the problem of signal bleed *without affecting content on other channels*. By contrast, the court of appeals' blocking alternative is voluntary, it does not eliminate all harmful material, it has the effect of blocking material that is not harmful, and it imposes significant costs and burdens on parents. In addition, in *Playboy*, the Court viewed the alternative it identified as sufficient in large part because the government had failed to demonstrate that "signal bleed" was a serious or pervasive problem. *Id.* at 819-821. In contrast, Congress enacted COPA because it determined that pornography is widely available on the Web and that minors can easily obtain access to it. 47 U.S.C. 231 note (Finding 1). And in *Playboy*, the law at issue would have resulted in a ban of 30-50% of adult viewing of constitutionally protected adult material. 529 U.S. at 812. In contrast, COPA results in no such ban.

2. As the district court found, COPA's screening requirement will not protect minors from all sources of harmful material. It does not apply to non-Web protocols on the Internet and non-commercial Web sites, and its application to foreign Web sites is problematic. Pet. App. 39a. Congress reasonably concluded, however, that domestic commercial Web businesses display a large quantity of material that is harmful to minors. H.R. Rep. No. 775, *supra*, at 7. Congress was entitled to address that serious problem caused by persons in

this country, and to do so with the most effective means available. The district court found that some minors may obtain access to credit cards and adult IDs, Pet. App. 39a, but there is no evidence that a substantial number of minors possess such cards or that the ones who do are free to use them without adult supervision. Thus, while COPA's reliance on credit cards and adult IDs is not a perfect solution, it is far more effective with respect to domestic commercial Web sites than blocking software.

Congress also did not ignore the dangers posed by other sources of harmful material. As to those sources, it concluded that blocking software constitutes the most practical solution currently available. The reason is that non-Web protocols lack the technology for age screening; enforcement of a screening requirement against foreign Web sites would create serious enforcement difficulties; and *Reno* v. *ACLU*, 521 U.S. at 876-877, raised questions about the constitutionality of imposing compliance costs on non-commercial Web sites. In contrast, despite its limitations, blocking software can be used to address each of those sources of harmful material to some extent. For that reason, in a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software. 47 U.S.C. 230(d).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Rather, Congress envisioned that they would work together to prevent minors from being exposed to harmful material. COPA's screening requirement applies where it is far more effective, and blocking software is available to limit the sources of harmful material that COPA's screening requirement cannot. In these circumstances, any debate about

which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which consists of COPA's screening requirement *and* the notification of customers of the availability of blocking software—is significantly more effective in preventing access to harmful material than blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, the court of appeals' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.

III. COPA IS NOT SUBSTANTIALLY OVERBROAD

The court of appeals further erred in holding that COPA is substantially overbroad. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored—that COPA does not require material to be viewed in context, that COPA does not have an older minor standard, that COPA's commercial purposes limitation is not narrow enough, and that the affirmative defenses result in an unacceptable burden on adults. Pet. App. 51a-57a. As previously discussed, the court erred in finding COPA not narrowly tailored on those grounds. For the same reasons, it erred in finding COPA substantially overbroad on those grounds.

The court also concluded that COPA's reliance on community standards "exacerbates" COPA's substantial overbreadth. Pet. App. 58a. Because the features of COPA on which the court relied in its narrow-tailoring analysis are not "constitutional problems" to begin with, *ibid*, COPA's reliance on community standards cannot exacerbate any such problems. And, as this Court held in *Ashcroft* v. *ACLU*, 535 U.S. at 585, "COPA's reliance on community standards

to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." Moreover, Congress determined when it enacted COPA that community standards concerning what is "prurient" and "patently offensive with respect to minors are likely to be "reasonably constant" throughout the United States. H.R. Rep. No. 775, *supra*, at 28. The court of appeals identified no evidence showing that judgment to be unreasonable, especially with respect to a nationwide medium like the Internet.

The court's overbreadth analysis is flawed for another reason. For a law to be unconstitutionally overbroad, its impermissible applications must be "'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197 (2003). Here, the court of appeals failed to establish that COPA's impermissible applications are substantial in an absolute sense, much less that they are substantial relative to COPA's many plainly legitimate applications.

Despite the numerous exhibits submitted by respondents and their amici in an effort to demonstrate that COPA has an unjustifiable scope, the court of appeals identified only three Web communications with serious value for adults that are even *arguably* covered by COPA. Pet. App. 52a-54a & n.35. The court's conclusion that those examples are arguably covered by COPA is premised on the court's view that COPA requires material to be viewed in isolation, rather than in context. *Id.* at 51a-52a. The court found that none of the examples are even arguably harmful to minors when viewed in context. *Id.* at 52a-54a & n.35. As previously discussed, material is covered by COPA only

if it is harmful to minors when viewed in context. Thus, the court of appeals held COPA substantially overbroad without identifying a single real life example of an invalid application. This Court's decisions do not permit that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JOHN ASHCROFT,
Attorney General of the United States,

Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the criminal and civil provisions of the Child Online Protection Act, 47 U.S.C. § 231, violate the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are: American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; BlackStripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Internet Inc., now known as Salon Media Group, Inc.; and West Stock, Inc., now known as ImageState North America, Inc. The plaintiff Internet Content Coalition is no longer in existence.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

(1) The parent corporation of respondent ArtNet Worldwide Corporation is ArtNet AG.

(2) Approximately 30% of the stock of respondent OBGYN.net is owned by MediOne, Inc., an affiliate of Medison Co., Ltd.

(3) The parent corporation of respondent Philadelphia Gay News is Masco Communications.

(4) PlanetOut Corporation now exists as part of PlanetOut Partners USA, Inc., which is a subsidiary of PlanetOut Partners, Inc. JP Morgan Partners and affiliated entities of JP Morgan Partners together hold more than 10% of the shares issued and outstanding of PlanetOut Partners, Inc. AOL Time Warner Inc., which had been listed as a major shareholder in prior stages of this litigation, does not hold more than 10% of the shares issued and outstanding of PlanetOut Corporation or PlanetOut Partners, Inc.

(5) The parent corporation of respondent West Stock, Inc., which has been renamed ImageState North America, Inc., is ImageState, PLC.

(6) Respondent Salon Internet Inc. is now known as Salon Media Group, Inc.

(7) Respondent Internet Content Coalition no longer exists.

(8) Respondent Riotgrrl hosts a Web site that is no longer operating.

(9) The following respondents do not have parent companies, nor do any publicly held companies own ten

percent or more of their stock: Addazi Inc. d/b/a/ Condomania, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ A Different Light Book Stores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Powell's Bookstore, RiotGrrl, and Salon Media Group, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

CORPORATE DISCLOSURE STATEMENT.....iii

TABLE OF AUTHORITIES.....ix

STATEMENT OF THE CASE.....1

A. The District Court's Decision And Factual Findings.....1

1. Plaintiffs And Their Speech.....2

2. The Challenged Statute.....6

3. The Deterrent Effect Of COPA's Defenses.....7

4. Additional Burdens Of COPA's Defenses.....10

i. Web-Based Chat Rooms And Bulletin Boards...10

ii. Adult Access Codes.....11

iii. Credit Card Verification.....11

iv. Web Site Redesign.....12

5. Less Restrictive Alternatives.....13

B. Congressional Reports Supporting The District Court's Findings.....14

C. The Court Of Appeals' Initial Opinion.....17

D. This Court's Prior Ruling.....17

E. The Court Of Appeals' Ruling On Remand.....18

SUMMARY OF THE ARGUMENT.....18

ARGUMENT.....21

I. A VARIETY OF EXISTING LAWS AND VOLUNTARY PRACTICES OFFER SIGNIFICANT PROTECTION FOR MINORS WITHOUT IMPOSING COPA'S CRIMINAL PENALTIES ON PROTECTEDSPEECH.....21

II. COPA MUST BE STRUCK DOWN IF IT FAILS STRICT SCRUTINY OR IS UNCONSTITUTIONALLY OVERBROAD.....24

III. COPA SUPPRESSES A VAST AMOUNT OF "HARMFUL TO MINORS" MATERIALS THAT ADULTS ARE CONSTITUTIONALLY ENTITLED TO COMMUNICATE.....28

A. Even The Government's Untenable View Of The Statute Threatens A Broad Range Of Protected Speech.....28

1. The Quantity And Diversity Of Speech On The Web Is Enormous.....28

2. COPA Threatens A Broad Range Of Web Businesses That Provide Their Information for Free.....30

3. COPA Threatens A Broad Range Of Speech On The Web That May Be Considered Harmful To Older Minors.....31

4. COPA Threatens A Broad Range Of Speech That May Be Harmful To Minors Even When The Entire Web Site Is Evaluated "As A Whole."....35

B. COPA's Plain Language Restricts An Even Greater Quantity Of Protected Expression.....37

IV. COPA'S AFFIRMATIVE DEFENSES DO NOT SAVE THE STATUTE, AND LESS RESTRICTIVE ALTERNATIVES ARE AVAILABLE TO PROTECT MINORS.....40

A. COPA's Defenses Pose Tremendous Burdens On Online Speakers And Users That Will Suppress Protected Speech.....40

1. COPA Would Require Web-Based Interactive Chat Rooms And Discussion Groups To Restrict Speech That Is Not Even Covered By The Statute.....40

2. COPA Unconstitutionally Forces Web Speakers To Choose Between Severe Criminal Penalties And The Substantial Financial Burdens Imposed By The Defenses..... 41

3. Any Mandatory Registration Will Unconstitutionally Prevent Or Deter Web Users From Accessing Protected Speech.....43

B. COPA's Burden On Speech Fails Strict Scrutiny And Is Overbroad.....46

C. COPA Is An Ineffective Method For Achieving The Government's Interest, And Less Restrictive, More Effective, Alternatives Are Available..... 48

CONCLUSION.....50

TABLE OF AUTHORITIES

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919 F.2d 1493 (11th Cir. 1990).....26

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4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*,
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No. Civ. 00-505 TUC ACM (D. Ariz. June 14, 2002).....47

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929 F. Supp. 824 (E.D. Pa. 1996) 41

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969 F. Supp. 160 (S.D.N.Y. 1997).....47

Ashcroft v. American Civil Liberties Union,
535 U.S. 564 (2002) 18, 39, 47

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122 S. Ct. 1389 (2002) 25, 27, 42

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 26

Bookfriend v. Taft,
No. C3-02-210 (S.D. Ohio Aug. 2, 2002).....47

Broadrick v. Oklahoma, 413 U.S. 601 (1973).....27

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447 U.S. 557 (1980).....48

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55 F. Supp. 2d 737 (E.D. Mich. 1999),
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422 U.S. 205 (1975).....26, 43

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721 F.2d 1281 (10th Cir. 1983).....46

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108 F. Supp. 2d 611 (W.D. Va. 2000).....47

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Reno v. American Civil Liberties Union,
521 U.S. 844 (1997).....passim

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492 U.S. 115 (1989).....26, 49

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Crime Victims Bd.*, 502 U.S. 105 (1991).....43

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282 F. Supp. 2d 389 (D. S.C. 2003).....47

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512 U.S. 622 (1994).....49

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780 F.2d 1389 (8th Cir. 1985).....46

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1997 WL 58727 (Wis. App., Feb. 13, 1997).....24

STATUTES

18 U.S.C. § 2252 22

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47 U.S.C. § 231 (1998) .....passim

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231 (1998), was signed into law on October 21, 1998. The following day, plaintiffs filed this suit in the United States District Court for the Eastern District of Pennsylvania, alleging that COPA violated the First Amendment to the Constitution. Plaintiffs sought an injunction to prevent COPA's enforcement.

A. The District Court's Decision And Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA, which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make[] any communication for commercial purposes that is available

to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223 (1996), because it would "inevitably curtail a significant amount of adult communication on the Internet." 521 U.S. at 877 (citation omitted). Petitioner has not disputed the district court's findings on appeal, and some of those findings were derived from a joint stipulation submitted by the parties. *See* Pet. App. 121a-148a. Based on this record, the district court held that plaintiffs were likely to succeed on their claim that COPA violates the First Amendment, because "COPA imposes a burden on speech that is protected for adults," *id.* at 156a, and because the government could not prove that COPA is the "least restrictive means available to achieve the goal of restricting the access of minors to [harmful to minors] material," *id.* at 159a.

1. Plaintiffs And Their Speech

Plaintiffs include a diverse range of individuals and organizations, ranging from "new media" online magazines to long-established booksellers. All plaintiffs use the World Wide Web (the "Web") to provide information on a variety of subjects, including sexually explicit issues that they fear could be construed as "harmful to minors." *See id.* at 129a-133a, ¶¶21, 24-26.

Plaintiffs and their users post, read and respond to sexually explicit content on the Web including books and photographs; online magazines; resources designed for gays and lesbians; and visual art and poetry. *See id.* at 129a, ¶21. The record contains extensive examples of plaintiffs' speech

at risk under COPA. *See generally* Court of Appeals Joint Appendix ("J.A.") 601-757; Suppl. Lodg. 1-78. (Pls. Exhs.).[1] For example, Plaintiff Salon Media Group, Inc. ("Salon"), is a leading general interest online magazine that publishes articles on current events, the arts, politics, the media, and sexuality. J.A. 139-40 (Talbot Testimony). Salon publishes a regular column entitled "Sexpert Opinion" by author and sex therapist Susie Bright, including sexually frank articles such as "Move over, Ken, it's 'Bend Over Boyfriend,'" which explores women's desire to penetrate their male partners, and "Beatings, eatings and other ass-candy," which recounts the author's experience at a sex club. J.A. 617-33 (Salon Exhs.). The Web site of RiotGrrl has comparably explicit material, including a woman's description of her ménage a trois fantasy, J.A. 737-39 (RiotGrrl Exhs.), and an essay titled "Blow Jobs: A Man Handler's Reverie," J.A. 749 (RiotGrrl Exhs.).

A Different Light Bookstore operates bookstores in California, and maintains a comprehensive Web site with information about books of interest to the gay and lesbian community. J.A. 106-07, 601-16 (Laurila Testimony, Pls. Exhs.). Among other content, A Different Light's Web site includes reviews of books about sadomasochism and fetishism such as "The Topping Book, or, Getting Good at Being Bad," "Whore Carnival," and "SM 101: A Realistic Introduction." J.A. 603-04 (A Different Light Exhs.). The site also includes excerpts from stories such as "Shame on Me," an autobiographical account of a young man's experience with masturbation and sexual shame. J.A. 609-12 (A Different Light Exhs.). The essay offers a critical assessment of sexual mores in today's society, with passages

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[1] Respondents cite to the Joint Appendix filed by the parties in petitioner's initial appeal to the Third Circuit, which has been incorporated into all subsequent appellate proceedings, and lodged with this Court.

like "[m]y dick's too big, my dick's too small, too hard, too cut, too uncut, my sperm doesn't come out straight enough or with enough force, my sperm tastes like coffee, ... my butt's too big, too scrawny, too hairy, too shiny, too closed, too open ...." J.A. 612 (A Different Light Exhs.). Likewise, Blackstripe, a Web-based resource for gay and lesbian individuals of African descent, has published on its Web site a powerful political essay about racism and sexuality entitled "How do you challenge the white cock you're sucking?" J.A. 753 (Blackstripe Exhs.).

Mitchell Tepper, a member of plaintiff ACLU, owns and operates the Sexual Heath Network Web site out of his home in Connecticut. The Sexual Health Network provides easy access to information about sexuality geared towards individuals with disabilities. Much of the Web site focuses on helping disabled persons experience sexual pleasure through the use of sex toys, and sexual surrogacy as a form of sexual therapy. Pet. App. 131a, ¶25; J.A. 670-88 (Sexual Health Network Exhs.).

Several plaintiffs host Web-based discussion groups and chat rooms that allow readers to engage in explicit conversations on various subjects. *See* Pet. App. 129a, ¶22. In addition to its news columns, Salon hosts a very popular set of discussion groups called "Table Talk," to which three thousand messages are posted each day, on topics such as "Can boys find the right spot?" J.A. 147-49 (Talbot Testimony). Salon archives its content, and its Web site contains tens of thousands of previously published pages. J.A. 145, 147 (Talbot Testimony). Likewise, the Sexual Health Network's Web site includes an interactive discussion area, including a forum called "Love Bites," where readers can ask experts frank questions about sexuality, and a bulletin board where users can post explicit comments about how to increase sexual pleasure. J.A. 672-85 (Sexual Health Network Exhs.). For example, in one exchange on the discussion board, posters shared suggestions about different

sexual positions that a large man and a petite woman could use to maximize their gratification. J.A. 683-85 (Sexual Health Network Exhs.).

The Web site of PlanetOut, an online community for gay, lesbian, bisexual and transgendered people, includes a bulletin board and chat rooms where users can discuss lesbian sexuality, and where teenagers who live in remote locations can discuss their sexual orientation. J.A. 661-69 (Pls. Exhs.). The site also allows users to post personal ads, including descriptions of their sexual interests and physical characteristics, and photographs of themselves in various states of dress and undress. J.A. 656-60 (Pls. Exhs.). The site is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reaction of others. Pet. App. 132a, ¶26.[2]

Plaintiffs, like the vast majority of speakers on the Web, provide the bulk of their online information for free.

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[2] Other plaintiffs include: Condomania, a leading online seller of condoms and distributor of materials about sexual pleasure and safety; ArtNet, a leading online vendor of fine art on the Web; Free Speech Media, which promotes extensive independent audio and video content on the Web; OBGYN.net, a comprehensive international online resource on obstetrics and gynecology; Powell's Bookstore, a large new and used bookstore with a Web site containing information on over one million books; Electronic Frontier Foundation; Electronic Privacy Information Center; RiotGrrl, a "Webzine" that advocates positive empowerment for women (the Web site is not currently operating); WestStock, now known as ImageState North America, Inc., an online seller of stock photographic images; BlackStripe, a Web-based resource for gay and lesbian individuals of African descent; American Booksellers Foundation for Free Expression, an organization that includes some on-line bookstores; and Philadelphia Gay News, which operates a Web site. *See* Pet. App. 130a at n.5; *see generally* J.A. 696-757 (Pls. Decl. Exhs.). One of the plaintiffs in the district court was the Internet Content Coalition, a non-profit professional association of well-known content providers including The New York Times, Reuter's, CBS News Media, CNET, and MSNBC. The Internet Content Coalition no longer exists, though its previous members are still in business.

See id. at 129a, ¶23. Like traditional newspapers and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See id.* at 134a-135a, ¶33; 47 U.S.C. §231(e)(2)(B). Although certain plaintiffs are large, well-known Web publishers, others are start-up operations run by single individuals. For plaintiffs such as these, a finding of liability under COPA could cause personal financial ruin in addition to jail time and a criminal record.

2. The Challenged Statute

COPA imposes severe criminal and civil penalties on persons who

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, make[] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors ....

47 U.S.C. § 231(a)(1)-(3). COPA authorizes a criminal fine of up to $50,000 and six months imprisonment, and a civil fine of up to $50,000 for each violation of the statute. *Id.* Those found guilty of "intentionally" violating COPA are subject to a fine of up to $50,000 a day for every day that the violation exists. *Id.* § 231(a)(2).

COPA defines "commercial purposes" as being "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). COPA then defines "engaged in the business" as meaning

> that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

47 U.S.C. § 231(e)(2)(B).

Section 231(c)(1) of COPA provides an affirmative defense to prosecution if the defendant,

> in good faith, has restricted access by minors to material that is harmful to minors – (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1); *see also id.* § 231(b).

3. The Deterrent Effect Of COPA's Defenses

The growth of commercial activity on the Web has been explosive.[3] At the time of the district court's decision, approximately one third of the 3.5 million sites on the Web were commercial within the meaning of COPA in that their operators "intend[ed] to make a profit." Pet. App. 133a, ¶27.

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[3] The number of commercial Web sites has risen dramatically since 1999. In January of 1999, there were 12,140,747 Web hosts using the domain name ".com", which is the top-level domain intended for commercial uses; in July of the same year, there were 18,773,097. By January of 2003 that number had risen to 40,555,072. *See* The Internet Software Consortium, Internet Domain Survey (visited Dec. 15, 2003) <http://www.isc.org/ds>.

A variety of business models operate on the Web. By far the most popular business model is the advertiser supported or sponsored model, "in which nothing is for sale, content is provided for free, and advertising on the site is the source of all revenue." *Id.* at 134a, ¶¶30, 31; J.A. 206 (Hoffman Testimony). The fee based or subscription model, in which users are charged a fee before accessing content, is the least popular. Pet. App. 134a, ¶31.

Most Web businesses do not make a profit. J.A. 214-15 (Hoffman Testimony). Web businesses are valued according to "the number of customers they believe the Web site is able to attract and retain over time, or 'traffic.'" Pet. App. 135a, ¶34; J.A. 216-20 (Hoffman Testimony). Traffic is "the most critical factor for determining success or potential for success on a Web site." Pet. App.135a, ¶ 34. Because "[t]he best way to stimulate user traffic on a Web site is to offer some content for free to users ... virtually all Web sites offer at least some free content." *Id.*

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See id.* at 136a-137a, ¶37; 177a. "Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults." *Id.* at 171a.

With regard to these affirmative defenses, the district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* at 136a-137a, ¶37. Thus, the uncontested evidence showed that the only technologies currently available for compliance with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity

before gaining access to restricted content. *Id.* at 131a-133a, ¶¶25-26; 155a.

Both defenses deter adults from accessing protected speech. *Id.* at 155a-156a. Because the "vast majority of information ... on the Web ... is provided to users for free," *id.* at 129a, ¶23, the district court found that COPA's registration requirements would deter most Web readers. *Id.* at 155a-156a. Peer-reviewed studies have shown that up to 75% of Web users are deterred by registration requirements; two-thirds of consumers would not even accept money in exchange for giving up personal information to Web sites. J.A. 227, 238 (Hoffman Testimony). Because of privacy concerns, users would simply forego accessing their material if forced to register or provide a credit card or adult access code. For this reason, the district court found that users "will only reveal credit card information at the time they want to purchase a product or service." Pet. App. 136a, ¶36.

Notably, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." Pet. App. 132a, ¶26; *see also* J.A. 133-35, 138, 156 (Laurila Testimony). When one of PlanetOut's competitors required identification, the competitor suffered a loss of viewership, with membership stuck at 10,000 compared to the 350,000 PlanetOut members and two million PlanetOut readers. *Id.*; J.A. 355, 368-69 (Reilly Testimony); *see also* J.A. 144 (Talbot Testimony) (noting that when a competitor switched from free content to a fee-based model, its "circulation plummeted overnight from ... over 150,000 individual users each month to about 20 to 30,000").

In additional to the strong deterrent effect of credit card or age verification, the district court found that the defenses imposed numerous additional burdens on protected speech.

4. Additional Burdens Of COPA's Defenses

i. Web-Based Chat Rooms And Bulletin Boards

Many plaintiffs provide "interactive fora such as Web-based electronic mail (email), Web-based chat, and Web-based discussion groups." Pet. App. 129a, ¶ 22. The evidence showed that Web-based chat rooms and discussion groups are vitally important features that contribute to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Reilly Testimony). They are some of the "vast democratic fora of the Internet," providing Web users with equal access and an equal voice. *Reno v. ACLU*, 521 U.S. at 868. Hundreds of thousands of people have communicated with each other on plaintiffs' sites alone, which represent only a miniscule portion of the discussions occurring at any given moment on the Web.

COPA would require that users of all interactive fora provide a credit card or adult access code before entering the discussion – *even discussions that contain a wide range of speech that is not harmful to minors.* Petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora, or to implement a full-time monitor on the site to read all content before it is posted." Pet. App. 145a, ¶58. The content in Web-based interactive fora is inherently dynamic, and there is no way to prohibit access to some materials while "still allow[ing] unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.*

ii. Adult Access Codes

There are about twenty-five services on the Web that will provide adult access codes to Web users in order to access a variety of adult Web sites. Pet. App. 140a, ¶ 48; 142a, ¶52; J.A. 401 (Farmer Testimony). To obtain an adult access code, a user must provide identification information and pay a fee to the adult access service, normally by providing a credit card number online. Pet. App. 142a, ¶51. No standards govern the operation of these services, and content providers cannot ensure their security or reliability. J.A. 386-87 (Farmer Testimony). Plaintiffs testified that most users would forgo accessing restricted content rather than provide their name and credit card to a third party adult access service, especially to access free content. J.A. 330-31, 344, 367-68, 370 (Barr, Tepper, Reilly Testimony).

A content provider that contracts with an adult access service is provided a script that must be placed in front of every restricted page. Pet. App. 141a, ¶49. To avoid requiring users to re-enter their passwords repeatedly, the content provider would have to obtain and utilize additional software tools enabling it to place all restricted material in one directory behind the adult verification screen. J.A. 467-78 (Alsarraf Testimony). Without the use of these additional tools, any user could successfully "attempt[] an end-run around the screen" and go directly to a site that was meant to be restricted. Pet. App. 142a, ¶53.

iii. Credit Card Verification

To use COPA's credit card defense, a content provider "would need to undertake several steps." *Id.* at 138a, ¶41. The steps would include "(1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit card numbers or

passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers." *Id.* The start-up costs would range from "$300 ... to thousands of dollars ...." *Id.* at 138a, ¶42.

A normal credit card transaction involves both an "authorize only" transaction, which determines whether the card is valid, and a "funds capture" transaction, which charges an amount to the user's credit card. *Id.* at 139a, ¶45. The government was unable to prove that credit card verification services would "authorize or verify a credit card number in the absence of a subsequent funds capture transaction." *Id.* Without such a service, a content provider would have to charge the user's credit card for accessing the content. J.A. 126, 129 (Laurila Testimony). Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. Pet. App. 139a, ¶45. Such per-authorization fees would not only substantially increase the costs of engaging in protected speech but would also allow users hostile to certain content to drive up costs to the provider simply by repeatedly accessing restricted content. J.A. 133 (Laurila Testimony).

Finally, the court found that because some minors "may legitimately possess a valid credit or debit card," they would have access to restricted content despite credit card verification. Pet. App. 140a, ¶48.

iv. Web Site Redesign

COPA's credit card and adult access defenses would also require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that the technological requirements for implementing credit card or adult access code verification to comply with COPA could be substantial – depending on the amount of content on a Web site, the amount of content that may be harmful to minors, the degree to which a Web site is organized into files and directories, the degree to which

harmful to minors material is currently segregated into a particular file or directory, and the level of expertise of the Web site operator. *Id.* at 137a, ¶39; 144a, ¶56. COPA would require some Web sites to reorganize and redesign literally millions of files. J.A. 158-59 (Talbot Testimony).

A content provider would also have to reorganize individual files and pages in order to restrict only content that could be harmful to minors. Pet. App. 143a, ¶54. Even a single page of Web content could have some content prohibited under COPA and some that was not. "Text is more difficult to segregate than images, and thus if a written article contains only portions that are potentially harmful to minors, those portions cannot be hidden behind age verification screens without hiding the whole article or segregating those portions to another page." *Id.* at 143a, ¶55.

In sum, the district court concluded that "the implementation of credit cards or adult verification screens before gaining full access to material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." *Id.* at 155a.

5. Less Restrictive Alternatives

The district court found that, in contrast to the severe and broad criminal penalties of COPA, Congress could have adopted a narrower restriction on speech that would advance the same purported interests. Given that petitioner has repeatedly claimed that Congress' goal was to prevent the free dissemination of "teaser" pictures, *see, e.g.*, Pet. Br. at 19, Congress could have restricted only pictures, images, or graphic text files "which are typically employed by adult entertainment Web sites as 'teasers.'" Pet. App. at 161a. The district court also noted that Congress could have resorted to civil penalties, rather than the draconian use of

criminal penalties for the distribution of protected speech. *Id.*

User-based filtering software constitutes another less restrictive alternative. At least forty percent of Web content originates abroad, and may be accessed by minors as easily as content that originates locally. *Id.* at 128a, ¶20. COPA cannot restrict this content, and also does not restrict the wide range of harmful to minors materials provided noncommercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. Conversely, as petitioner's expert conceded, parents can use user-based blocking software to prevent access to these materials, in addition to blocking Web-based commercial materials. *Id.* at 148a, ¶65. User-based blocking software can also block other categories of material that parents may deem inappropriate, such as violence or hate speech. J.A. 314 (Magid Testimony). To establish these controls, parents may either purchase software for their home computers or choose an Internet Service Provider or online service such as America Online that offers parental software controls. Pet. App. 148a, ¶65; J.A. 309 (Magid Testimony). These services also may provide tracking and monitoring software to determine which resources a child has accessed, and offer access to children-only discussion groups that are closely monitored by adults. J.A. 162-63 (TRO Memorandum Opinion).

For all of these reasons, the district court ruled in favor of plaintiffs and granted a preliminary injunction enjoining the government from enforcing COPA.

B. Congressional Reports Supporting The District Court's Findings

Since the district court's decision, two separate reports commissioned by Congress have independently concurred with the district court's factual findings. Specifically, when Congress passed COPA, it also set up the

Commission for Online Child Protection to study methods of reducing access by minors to sexually explicit material.[4] The National Research Council (the "NRC") also studied ways to address material on the Internet that is inappropriate for children, publishing over 350 pages on the subject.[5] The COPA Report and the NRC Report both independently identified a number of alternatives for protecting children, and both concluded that applying criminal laws to protected speech on the Internet poses significant First Amendment problems, while failing to protect children effectively. *See* COPA Report at 9, 11, 13, 25, 39; NRC Report, Executive Summary at 11-13 (summarizing alternatives), Sec. 14.4.3 ("in an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

Like the district court, the COPA Report found that requiring age verification systems would not be "effective at blocking access to [non Web-based] chat, newsgroups, or instant messaging." COPA Report at 27. It also noted that where either age verification or credit cards are required, "[a]n adverse impact on First Amendment values arises from the costs imposed on content providers, and because requiring identification has a chilling effect on access." *Id.* at 26-27. The NRC Report found that "widespread [use of age verification technology] may compromise the privacy of

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[4] Commission on Child Online Protection, Final Report to Congress, Oct. 20, 2002 ("COPA Report"), at http://www.copacommission.org/report. This report essentially served as a substitute for thorough congressional findings. COPA was passed as a part of an omnibus appropriations bill, with no hearings in the Senate and only one hearing in the House.

[5] Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, Youth, Pornography, and the Internet, Dick Thornburgh and Herbert S. Lin, eds., (2002) ("NRC Report"), at http://www.nap.edu/books/0309082749/html/.

adult viewing." NRC Report at 347, Section 13.3.7. When users are required to give personally identifying information to verify age, "the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has a plausible reason to be concerned that his name is associated with certain types of material." *Id.* at 344, Sec. 13.3.5. This loss of privacy "may inhibit free flow of information and create a chilling effect on the freedom of adults who wish to access lawful though perhaps controversial material." *Id.* at 348, Section 13.3.7.

The COPA Report also concluded that COPA's protections were underinclusive, given the law's inability to reach inappropriate material originating from abroad. COPA Report at 11, 13, 25, 39. The NRC Report pointed out that the international nature of the Internet "pose[d] substantial difficulties" for those attempting to regulate content on the Web that is harmful to minors. NRC Report, Executive Summary at 12.

Both reports emphasized that there are numerous alternative means of restricting minors' access to certain materials, many of which would be more effective than COPA. The reports called for the government to vigorously enforce obscenity and child pornography laws. *See id.* at Section 14; *see also id.* at Section 9.1; COPA Report at 43. It suggested the government could also

> promote media literacy and Internet safety education (including development of model curricula, support of professional development for teachers on Internet safety and media literacy, and encouraging outreach to educate parents, teachers, librarians, and other adults about Internet safety issues); support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate manner; and support self-regulatory efforts by private parties.

NRC Report, Executive Summary at 8.

Like the district court, the reports also applauded the use of "voluntary methods and technologies to protect children," and noted that, "[c]oupled with information to make these methods understandable and useful, these voluntary approaches provide powerful technologies for families." COPA Report at 39; *see also id.* at 8, 21, 25, 27; NRC Report, Executive Summary at 10 ("filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of material is acceptable"); *see generally id.* at Section 2.

C. The Court Of Appeals' Initial Opinion

On the initial appeal of the district court's decision, the Third Circuit upheld the district court's ruling that COPA violates the First Amendment, *see* Pet. App. 69a. The court held that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* The court affirmed on this single ground, and did not reach the other grounds relied upon by the district court.

D. This Court's Prior Ruling

This Court vacated and remanded the decision by the Court of Appeals finding COPA unconstitutional. Rejecting the Third Circuit's approach, the Court narrowly held "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft v. American Civil Liberties Union*,

535 U.S. 564, 585 (2002) (emphasis in original). Significantly, however, the Court did not lift the injunction preventing the government from enforcing COPA absent further action. *Id.* at 586. The Court then remanded the case for further proceedings on issues including "whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the district court correctly concluded that the statute likely will not survive strict scrutiny analysis...." *Id.* at 585-86.

E. The Court Of Appeals' Ruling On Remand

On remand, the Third Circuit reaffirmed its conclusion that COPA was unconstitutional. Pet. App. 18a. In its primary holding, the court ruled that COPA failed strict scrutiny because it would deprive adults of material they are constitutionally entitled to receive. *Id.* at 38a. Reviewing the plain language of the statute, the court concluded that COPA "endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted ...." *Id.* at 23a. The court rejected the government's plea to re-write the statute to narrow its application, and found that COPA's affirmative defenses, did nothing to ameliorate the statute's burden on speech protected for adults. The court further held that other alternatives, including Internet filtering software, were "substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful materials." *Id.* at 47a.

SUMMARY OF THE ARGUMENT

COPA was passed in 1998, when the Internet was still relatively new and less understood. Like Congress' first attempt at legislation in this area, struck down by this Court in *Reno v. ACLU*, COPA relies exclusively on threatening Web speakers with severe criminal and civil penalties for communicating protected speech. COPA's bludgeon suppresses an enormous amount of speech protected for

adults, and is unnecessary and ill-tailored to address the government's interest in protecting children from sexually explicit content.

Absent enforcement of COPA, a variety of existing laws and tools already offer significant protection for minors using the Internet. Significantly, the government has all but ceased using one of the most potent protections available, the federal obscenity law. The government's failure to protect minors from materials that are obscene even for adults seriously undermines its claimed need for a much broader law that burdens protected speech. In addition, three new federal laws protect minors by requiring the use of filtering software in schools and libraries throughout the country, educating parents about the availability of filters for use in the home, and creating a new .kids domain that provides a safe online environment for children. Since enactment of COPA, two reports commissioned by Congress offer a variety of additional suggestions for protecting minors *without* imposing criminal sanctions on adult speech. In contrast to the many other options now available, COPA offers only marginal support for the government's interest while imposing a censorship regime on the Web that is far more draconian than in any other medium.

The government has only two responses to COPA's presumptive unconstitutionality. While conceding that COPA burdens adult speech, the government argues that the statute targets only a narrow range of speech, and that its affirmative defenses reduce the burden on that speech. The uncontested trial record, largely ignored by the government, defeats both arguments. First, the record shows that even the government's untenable view of the statute would threaten a broad range of protected speech. Specifically, the government concedes that COPA targets not just speakers and businesses who *sell* their speech on the Web, but also the vast majority of speakers and businesses who provide their Web speech *for free*. Similarly, COPA threatens a

substantial amount of speech even if interpreted to exclude material with value for *older* minors, and to require an evaluation of material in the context of an entire Web site. Given the vast quantity and diversity of speech on the Web, even a narrow view of the statute targets a broad range of speech that by definition is not "obscene," and is therefore protected, for adults.

Second, COPA's affirmative defenses, identical to those found insufficient by this Court in *Reno v. ACLU*, burden millions of content providers who have no effective way to prevent minors from obtaining their speech without also deterring and burdening access by adults. The two reports commissioned by Congress now confirm the key findings of the trial court. COPA's defenses would force Web speakers to choose between risking criminal prosecution or implementing costly defenses that would inevitably deter their adult users. Even assuming that Web speakers would not self-censor to avoid the risk of jail time, the record shows that up to 75% of Web users would be deterred by either credit card or adult access screens. Furthermore, these screens must be placed at the entrance to Web-based chat rooms and discussion boards, which are vitally important features on many Web sites, thus restricting conversations not even targeted by the statute.

Under this Court's clear precedents, specifically affirmed in the Internet context, COPA thus violates strict scrutiny and is overbroad because it "effectively suppress[es] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874. Especially with a broad range of more effective tools available, Congress may not enforce its interest in protecting minors by making it a crime to communicate constitutionally protected material to adults.

ARGUMENT

I. A VARIETY OF EXISTING LAWS AND VOLUNTARY PRACTICES OFFER SIGNIFICANT PROTECTION FOR MINORS WITHOUT IMPOSING COPA'S CRIMINAL PENALTIES ON PROTECTED SPEECH.

Today, *absent* enforcement of COPA, a variety of laws and voluntary practices are available to protect minors from sexually explicit content Though the government claims that COPA is necessary to protect minors, it has not even used all of the tools currently available. Given the significant protections already in place, surveyed briefly below, COPA's criminal penalties clearly fail strict scrutiny.

First, and most fundamentally, federal law already makes it a crime to distribute material – in any form – that is obscene. Yet the government has prosecuted only a handful of obscenity cases in the last twenty-five years.[6] Nor did obscenity prosecutions increase when the Internet vastly expanded in the 1990s, despite Congress' repeated claims

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[6] U.S. Justice Department obscenity enforcement records from the past ten years, available from the Transactional Records Access Clearinghouse (TRAC) at http://trac.syr.edu, indicate there have been fewer than 15 obscenity prosecutions annually since 1997. *See also* "American Porn," PBS Frontline documentary, reporting that federal obscenity prosecutions essentially stopped in the 1990s, at http://www.pbs.crg/wgbh/pages/frontline/shows/porn/prosecuting/. A number of the organizations that filed briefs in support of the government in this case have criticized this drop in obscenity prosecutions. The Family Research Council has said "FRC has been concerned that over the past three years of the Bush administration we have seen few if any obscenity prosecutions." *See* http://www.frc.org/get.cfm?i=WA03I87#-WA03I87. Morality in Media has stated that "[h]ad the obscenity laws been properly enforced," the percentage of children who have reported viewing pornography "would have been much, much smaller." *See* Matt Pyeatt, "Teen Internet Porn Study Stirs Debate," CSNNews.com, Dec. 12, 2001.

that online pornography was a problem. Because obscene material is not constitutionally protected for adults or minors, prosecuting obscenity raises none of the constitutional concerns that COPA does. Though the government claims that its interest in protecting minors from sexually explicit material is "compelling," it has failed to protect minors from materials that are obscene even for adults – a category significantly more explicit (and thus hypothetically more harmful) than the constitutionally protected materials that COPA seeks to criminalize. By contrast, the government has successfully prosecuted child pornography and solicitation of minors on the Internet and elsewhere.[7] These laws also already offer significant protection for minors.

Furthermore, three new federal laws now specifically protect minors from accessing inappropriate materials on the Internet. The first, the Children's Internet Protection Act, mandates the use of filtering software in all public schools and libraries that receive federal funds (the vast majority of all schools and libraries). That law was upheld by this Court last Term. *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003). The second, the Dot Kids Implementation and Efficiency Act of 2002, creates a special ".kids.us" domain on the Internet that "provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet." 116 Stat. 2766. The third, passed along with COPA and not challenged here, requires all Internet Service Providers to inform parents of the availability of filtering software for use in the home. Since COPA was passed, two congressionally sponsored commissions have recommended numerous additional steps that the government, teachers, and parents can take to minimize exposure and reduce any harmful effects. *See* Statement of the Case, *supra* at Section B.

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[7] *See* Transactional Records Access Clearinghouse, at http://tracfed.syr.edu, reporting Justice Department data for prosecution under 18 U.S.C. § 2252 from the last ten years.

Finally, all of the harmful to minors materials that are *for sale* on the Internet are *already* behind credit card screens. In this sense the online medium, by virtue of its structure, offers more protection than is available in the majority of book stores and convenience stores around the country.

In summary, in today's world, a minor is already protected from accessing sexually explicit material online whenever: 1) the minor is accessing the Internet at school or in a public library; 2) the material is for sale; 3) the material is obscene or contains child pornography; or 4) the minor is accessing the Internet at home and the parents are using filtering software. The government's argument that an injunction against COPA will leave minors unprotected from sexually explicit material on the Internet ignores all of these existing protections.

It is against this backdrop that the government seeks to defend the constitutionality of COPA, which severely threatens the right of adults to access protected speech by making it a *crime* to display materials online that are harmful to minors. Far from bringing the Internet into conformity with rules in other media, COPA would in fact create a federal censorship regime that is more draconian than in any other medium. Never before has there been a federal criminal harmful to minors law in any medium – COPA is the first. There is no federal law that criminalizes even the direct sale to a minor, let alone the display, of books, magazines, newspapers, CDs, movies, videos, DVDs, or video games that are harmful to minors.

COPA would also impose federal rules that conflict with the decisions made by half of the states *not* to prohibit the display – rather than the direct sale – of harmful to minors materials. Even states that have offline harmful to minors display laws rarely enforce them. When they are enforced, the targeted content has varied widely and has

included content far less explicit than the plaintiffs' speech in this case.[8] This court has never upheld the constitutionality of state display laws,[9] and as the government concedes, some courts have recognized constitutional problems with their application even to offline media.

Though drastically impacting adult speech rights, this new federal criminal law would do little to advance the government's interest in protecting minors. COPA would do nothing to protect minors from harmful material delivered via e-mail, non-commercial Web sites, non-Web-based chat rooms or discussion boards, or from any Web site originating outside the United States. Any marginal benefit provided by COPA's criminal penalties simply cannot be justified under this Court's precedents, given COPA's heavy burden on adult communication and the numerous other effective tools for protecting minors.

II. COPA MUST BE STRUCK DOWN IF IT FAILS STRICT SCRUTINY OR IS UNCONSTITUTIONALLY OVERBROAD.

Under COPA, it is a crime to make "any communication [on the Web] for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). Once a

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[8] *See, e.g., State v. Vachon*, 306 A.2d 781, 784 (N.H. 1973) (holding that the sale of a button with the slogan "Copulation Not Masturbation" was obscene as to minors under *Ginsberg*), *rev'd on other grounds*, 414 U.S. 478 (1974); *Wisconsin v. Stankus*, 1997 WL 58727 (Wis. App., Feb. 13, 1997) (upholding conviction for exposing a child to harmful material by displaying a photograph of "a woman with a shirt and jacket open to the waist, without exposing her nipples.").

[9] In *Virginia v. American Booksellers*, the Court said that a Virginia state harmful to minors display law could present "substantial constitutional questions" depending on its impact on adult speech. 484 U.S. 383, 394 (1988). On remand, the Fourth Circuit ultimately upheld the law only after it was narrowly construed by the Supreme Court of Virginia.

speaker posts content on the Web, it is available to all other Web users worldwide. J.A. 114, 145, 148; *see also Reno v. ACLU*, 521 U.S. at 853. Unlike face-to-face communications, it is not technologically possible for a speaker to know the age of a user who is accessing her communications on the Web. *See Reno v. ACLU*, 521 U.S. at 855, 876. Thus, in order to avoid the risk of criminal prosecution and civil penalties, COPA requires Web speakers to restrict access by both minors *and adults* to any speech that may be considered "harmful to minors."

COPA criminalizes a category of speech that is unquestionably constitutionally protected for adults. This Court has repeatedly held that "the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 875 (citations omitted); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it"); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

Applying this time-honored First Amendment analysis, the Court has invalidated two recent attempts by Congress to criminalize non-obscene sexually explicit speech. *Reno v. ACLU*, 521 U.S. at 875 (striking down the Communications Decency Act); *Free Speech Coalition*, 122 S. Ct. at 1402 (invalidating ban on "virtual" child pornography). Like those statutes, COPA "proscribes a significant universe of speech that is neither obscene ... nor child pornography." *Free Speech Coalition*, 122 S. Ct. at 1396; *see also Reno v. ACLU*, 521 U.S. at 874.

As a content-based regulation of protected speech, COPA is presumptively invalid. *R.A.V. v. City of St. Paul*,

505 U.S. 377, 391 (1992). Content-based regulations of speech will be upheld only if they are justified by a compelling governmental interest and are "narrowly tailored" to effectuate that interest. In concluding that strict scrutiny applies to content-based bans, this Court has held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. at 870; *see also id.* at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Court has *never* upheld a criminal prohibition on non-obscene communications between adults. *Id.* (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotation marks omitted)); *Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) (invalidating indecency ban on telephone communications); *Bolger*, 463 U.S. at 74 (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (invalidating a conviction for distribution of indecent publications). This Court has uniformly rejected such attempts to "burn the house to roast the pig." *Butler*, 352 U.S. at 383.[10]

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[10] *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" to adults); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that "*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them").

This Court has also rejected even non-criminal speech regulations that attempt to "'reduc[e] the adult population ... to ... only what is fit for children.'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (invalidating law requiring cable television operators to segregate and block "patently offensive" content on certain channels); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2002) (invalidating law requiring cable television operators to scramble channels); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating tobacco advertising restrictions aimed at preventing children from viewing such advertising).

Analyzed under the related overbreadth doctrine, COPA is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Free Speech Coalition*, 122 S. Ct. at 1399; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, because COPA "impos[es] criminal penalties on protected speech," it is a "textbook example of why ... facial challenges [are permitted] to statutes that burden expression." *Free Speech Coalition*, 122 S. Ct. at 1398. COPA cannot stand if it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874.

The government may overcome COPA's presumptive unconstitutionality only by proving that the statute is narrowly tailored to achieve its interest. Effectively conceding that COPA burdens speech for adults, the government has only two arguments: 1) COPA applies only to a narrow range of speech, and 2) COPA's affirmative defenses reduce the burden on adult speech. As discussed below and confirmed by the undisputed record, even the government's view of the statute threatens a broad range of protected speech, and the defenses will substantially chill adult speakers and deter Web users from communicating that speech.

III. COPA SUPPRESSES A VAST AMOUNT OF "HARMFUL TO MINORS" MATERIALS THAT ADULTS ARE CONSTITUTIONALLY ENTITLED TO COMMUNICATE.

A. Even The Government's Untenable View Of The Statute Threatens A Broad Range Of Protected Speech.

1. The Quantity And Diversity Of Speech On The Web Is Enormous.

Throughout its brief, the government repeatedly suggests that COPA covers only "commercial pornography." The term "pornography" is mentioned nowhere in the statute, and has no legal meaning. The government's use of the term in no way cabins the reach of the statute, and is merely a prejudicial label for speech that by definition adults have the right to access. The relevant question is whether COPA's restriction of "harmful to minors" material burdens a substantial amount of speech on the Web.

As an initial matter, the sheer quantity of speech on the Web cannot be overestimated. As of 2002, there were over 40 million commercial Web sites, most of them originating in the United States. Unlike other mass media, which are dominated by a finite number of large and powerful businesses, small businesses have flourished on the Internet because it reaches mass audiences "and provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. at 870. Regardless of how narrowly one defines the speech that COPA regulates, it inevitably encompasses an enormous quantity of speakers and businesses.

The record in this case is full of examples that illustrate the breadth of sexually explicit speech on the Web. COPA threatens any business that offers "patently offensive" written or visual depictions of an "actual or simulated sexual

act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast." 47 U.S.C. § 231(e)(6). The government's pretense that the appellate court discussed only a few examples of such speech ignores the extensive record. The following examples, in addition to those highlighted in the Statement of the Case, are illustrative:

- ArtNet's Web site displays photographs from Andres Serrano's series "A History of Sex." J.A. 710-13 (ArtNet Exhs.).
- ACLU member Patricia Nell Warren's Web site includes a graphic account of a fifteen-year-old who was date-raped when she was thirteen. J.A. 732-36 (Warren Exhs.).
- A Different Light's site contains an article describing a gay author's first experience of masturbation. J.A. 609-12 (Laurila Exhs.).
- PlanetOut offers archives of an Internet radio show called "Dr. Ruthless" that discusses topics such as anal sex and masturbation. J.A. 658-60 (Reilly Exhs.).
- RiotGrrl's articles include explicit descriptions of an author's first experience with oral sex. J.A. 745-48 (Douglas Exhs.).

See generally J.A. 601-757; Supp. Lodg. 1-78.

Web-based chat rooms and discussion boards involving sexual topics are also extremely popular and widespread on the Internet. PlanetOut alone has over forty chat rooms about gay sexuality and Salon's Table Talk has thousands of discussions about sexual pleasure. *See* J.A. 359-360 (Reilly Testimony); J.A. 147-149 (Talbot Testimony). Given the popularity of interactive messages and the millions of commercial Web sites, the examples above are far from isolated. Pet. App. 132a-134a, ¶27; *see also* Amicus Curiae Brief on Behalf of American Society of

Journalists & Authors, et al.; Amicus Curiae Brief on Behalf of Volunteer Lawyers for the Arts, et al. The Third Circuit thus properly held that COPA "encroaches upon a significant amount of protected speech ...." Pet. App. 51a. As discussed below, even the government's reading of the statute fails to significantly narrow the quantity of protected speech that COPA threatens.

2. COPA Threatens A Broad Range Of Web Businesses That Provide Their Information For Free.

The government argues that, unlike the CDA, COPA's impact on protected speech is negligible because it applies only to speakers who communicate "for commercial purposes" on the Web. But it concedes that COPA applies to much more than the direct sale of harmful to minors material on the Web. COPA threatens all of the speech that is provided *for free* on the Web by commercial businesses who seek to profit "through sales of 'advertising space'." Pet. Br. at 33.

COPA applies to *any* speaker who knowingly makes any communication "for commercial purposes ... that includes any material that is harmful to minors." "Commercial purposes" is further defined to mean that the speaker is "engaged in the business" of making prohibited communications when she "devotes time, attention, or labor to such activities, as a regular course of such person's trade of business, with the objective of earning a profit." 47 U.S.C. 231(e)(2)(A)-(B). COPA specifically allows prosecutors to seek criminal sanctions against businesses that offer material that is harmful to minors, even if it is not the "sole or principal part" of their business. 47 U.S.C. 231(e)(2)(B). The government nevertheless reads this language as protecting from prosecution businesses who only "occasionally" provide harmful material. But even that interpretation applies to a broad range of Web speakers.

In its brief, the government says that even a site that primarily offers medical information could be prosecuted if it "displays a bi-weekly column of sexually explicit pornography that is harmful to minors even when viewed in the context of a medical Web site." Pet. Br. at 37. A Web site seeking to comply with COPA would reasonably fear prosecution if it offers merely a single bi-weekly column that could be construed as harmful to minors. A number of the plaintiffs meet this definition.

For example, Salon Magazine devotes regular columns, features, and discussion boards to candid discussions about sex. *See* J.A. at 157 (Talbot Testimony) (a key editional mandate for salon.com is to promote honest conversations in an "adult and frank fashion about ... controversial subjects like sex and politics."). In addition, several plaintiffs host ongoing interactive chat discussions that customarily involve sexual content. Specifically, Salon provides a discussion group called Table Talk in which users exchange ideas that often are sexually explicit in nature. J.A. at 147 (Talbot Testimony). Similarly, PlanetOut's Web site always contains discussions devoted to sexuality. J.A. 359-61 (Reilly Testimony). In addition, all or nearly all plaintiffs provide archived material on their sites and thus "regularly" offer harmful to minors communications. For example, ArtNet.com archives all content and thus will always contain such material as Andres Serrano's "A History of Sex (The Kiss)," J.A. 713 (ArtNet Exhs.), and Ashley Bickerton's "Rosie and the General," J.A. 715 (ArtNet Exhs.).

3. COPA Threatens A Broad Range Of Speech On The Web That May Be Considered Harmful To Older Minors.

COPA's exclusion of material with "serious value to minors" also fails to save the statute, even under the government's reading. Because COPA protects only speech that jurors believe has serious value for minors, plaintiffs

legitimately fear prosecution for material that jurors may believe has no value for *minors* but clearly has value for *adults*. The government argues that the impact on adult speech is narrowed if COPA's "serious value" prong is interpreted to protect all material with value for "older minors." Pet. Br. at 29. Under that interpretation, though, COPA still reaches a broad range of speech that many – including petitioner himself – view as harmful even for older minors.

Congress' own recent report confirms that there is widespread disagreement about what content is inappropriate for older minors. The National Research Council found that "[a] great deal of sexually explicit material falls into the category over which consensus among diverse groups is not easily forthcoming." NRC Report, Section 7.3. In particular, the report confirms that

> Sex education is highly contentious, and some public schools avoid teaching anything about this topic because parents have such different perspectives on what information is appropriate to provide to young people. Some parents feel that providing young people with information on birth control is unacceptable because it conveys a permissive attitude about premarital sexual activity, and some believe that it increases the frequency of sexual activity in minors.

Id.[11] Petitioner Ashcroft himself has indicated that he is opposed to any sexual education for any minor other than the

[11] Indeed, in 2001 Congress passed a statute providing funds only for abstinence-only education. The Act states that "none of the funds authorized under this chapter shall be used ... to provide sex education or HIV–prevention education in schools unless that instruction is age appropriate and includes the health benefits of abstinence." 20 U.S.C. § 7906 (2001).

promotion of abstinence.[12] Many of the organizations who filed amicus briefs in support of the government in this case have also taken strong positions against sex education beyond the promotion of abstinence.[13]

In addition, many plaintiffs and other Web speakers provide information on how to experience sexual pleasure, including discussions of masturbation and oral sex. J.A. at 343 (Tepper Testimony). For example, as Dr. Tepper of the Sexual Health Network testified, "Based on my interpretation of the words I read, and specifically, in respect to minors, I have to believe discussion of masturbation, oral sex, anal sex, descriptive positioning, all may be construed as 'pandering to the prurient interest of minors.'" *Id.* at 343 (Tepper Testimony). Many adults would surely find this content harmful to minors under COPA, even if they were willing to permit access to explicit instructions intended to protect teenagers from sexually transmitted diseases or unwanted pregnancies. *See also* Amicus Brief of American Society of Journalists and Authors, et al.

The National Research Council Report reached similar conclusions about material regarding sexual orientation:

> [Some] materials depict what it means to be lesbian or gay in sexual orientation; what for some people is a description of positive feelings about one's orientation is for others an endorsement of a perverse lifestyle. Having two same-sex people identified as a

[12] Press Release, Planned Parenthood, *Appointment Watch*, at http://www.ppfa.org/About/PRESSRELEASES/_122100_attgenAsh.html (last visited Jan. 13, 2004) (Ashcroft voted to support "$75 million to be earmarked for abstinence only education" in 1996).

[13] *See* Focus on the Family, at http://www.family.org; Family Research Council, at http://www.frc.org (last visited Jan. 13, 2004).

> couple or depicting them as kissing is very offensive to some people.

Id. For example, as Senator, petitioner Ashcroft said "homosexuality is a sin."[14] Voting against the Employment Nondiscrimination Act, which would have prohibited discrimination based on sexual orientation, Ashcroft stated that the Act "contain[ed] seeds of real instability and inappropriate activity, which could grow way out of hand and send the wrong signals to young people."[15] Many of the organizations who filed amicus briefs in support of the government in this case have taken similar positions.[16]

Given these findings, even assuming material with serious value for *older* minors is protected, plaintiffs such as PlanetOut and A Different Light Bookstore fear prosecution for sexually explicit speech that actively promotes homosexual conduct. Web sites such as Mitch Tepper's Sexual Health Network and even OBGYN.net fear that they will be targeted by prosecutors who share Attorney General Ashcroft's view that all minors should be protected from frank sex education materials. Countless other Web sites offer similar content at risk under COPA.

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[14] Derrick Jackson, "Ashcroft's Backtrack on Gay Pride at Justice," Boston Globe, June 11, 2003, A23.

[15] Michelangelo Signorile, *John Ashcroft's Anti-Gay Crusade*, Gay.com, Jan. 16, 2001, available at http://www.signorile.com/articles/gcash.html (last visited Jan. 13, 2004) (Ashcroft also said "the Bible calls [homosexuality] a sin, and that's what defines sin for me").

[16] *See*, e.g., Family Research Council, at http://www.frc.org/get.cfm-?I=ISO2E3 (drawing multiple inferences between homosexuality and child abuse) (last visited Jan. 13, 2004); National Legal Foundation, at http://www.nlf.web-08.hosting.core.com/marriage%20petition.htm (last visited Jan. 13, 2004) (opposing gay marriage and organizing petition in response to decision by the Massachusetts Supreme Court); Focus on the Family, at http://www.family.org/-cforum/feature/a0027979.cfm (last visited Jan. 13, 2004) (opposing the "homosexual agenda").

It is also important to note that COPA's "serious value" prong does not provide protection for *all* material with "serious value" for minors, but rather protects only material that has "serious *literary, artistic, political, or scientific* value for minors." 47 U.S.C. § 231(e)(6). Unlike some state statutes, COPA does not protect material with "educational" value, providing additional cause for concern by sex education providers. In addition, the broad range of speakers who provide their content purely for its entertainment value can find no comfort at all in the serious value clause. *See* J.A. at 352-377 (Reilly Testimony); Supp. Lodg. 21-39 (Douglas Decl. & Exhs.); *see also* Amicus Brief of American Society of Journalists and Authors, et al.[17]

4. COPA Threatens A Broad Range Of Speech That May Be Harmful To Minors Even When The Entire Web Site Is Evaluated "As A Whole."

COPA also requires that material be viewed "as a whole" in determining whether it is harmful to minors. This requirement also fails to narrow the broad range of protected speech impacted by COPA. For the first time in over five years of litigation, in response to a question from Justice Kennedy in this Court's prior opinion, the government has offered an interpretation of the "as a whole" requirement in the context of the Web. It argues that "[i]n general … individual pictures or articles should be examined in the context of an entire Web site." Pet. Br. at 28. Leaving aside the numerous problems with that interpretation, *see* discussion *infra* at III. B., most of the plaintiffs – and thus countless similar speakers on the Web – have every reason to fear prosecution under even this narrow construction.

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[17] Further, a defendant would be liable under COPA's civil penalties if a jury found by a mere preponderance of the evidence that her speech lacked value for minors. 47 U.S.C. § 231(a)(3).

First, some plaintiffs' Web sites and a wide range of similar sites are entirely or substantially devoted to sexually explicit material that many consider harmful to minors. J.A. 341-343 (Tepper Testimony); J.A. 696-702 (Pls. Decl. Exhs). Second, the government is equivocal about its "entire Web site" rule, carefully stating that it is not a "universal rule for applying the 'in context' requirement." Pet. Br. at 28. The government's own examples show that it wants to preserve the option of prosecuting Web sites even if they display only small amounts of prohibited material. For example, the government suggests that even Web sites with a variety of content could be at risk if they "highlight" sexually explicit material. Pet. Br. at 29. Blackstripe and Salon have consistent articles, columns and features that are sexually explicit and are promoted or "highlighted" on their Web site. J.A. 753-757, J.A. 617-633 (Pls. Decl. Exhs).

In addition, referring specifically to the Web pages of Salon and ArtNet, petitioner himself previously argued to this Court that "[s]ome of respondents' exhibits ... plainly do test, and likely exceed, the legal limitations imposed by th[e] three prongs" of the harmful to minors test. *See* Pet. Br., No 00-1293, at 37 (filed July 2001). Although the "as a whole" analysis is clearly part of the "three prong[ed]" test, it would apparently fail to keep these plaintiffs out of jail despite the presence of a wide range of non-sexually explicit material on their Web sites. There is no meaningful distinction between these Web sites previously targeted by the government and those of other plaintiffs. If Salon's columns on anal penetration fall within the statute's ambit, A Different Light Bookstore's article describing a gay author's first experience of masturbation is also at risk. Similarly, if ArtNet's Andres Serrano photographs are at risk, other online museum sites with sexually explicit artwork should feel similarly threatened and may justifiably self-censor to avoid COPA's criminal penalties.

Finally, the government's interpretation would put smaller Web sites at risk, because they would have less content to insulate any offending material from prosecution under an "entire Web site" evaluation. For example, a Mapplethorpe photograph on the Web site of the Museum of Metropolitan Art might be safe, while the same photograph on the Web site of a small online gallery devoted to Mapplethorpe would be at risk. In summary, even the government's interpretation of "as a whole" threatens a wide range of Web sites.

B. COPA's Plain Language Restricts An Even Greater Quantity Of Protected Expression.

As discussed above, even accepting the government's view of the statute, COPA is not narrowly tailored because it restricts a broad range of speech protected for adults. Without radical surgery to re-write the statute and narrow its reach, COPA would suppress even more protected speech. Because the government's proposals ultimately fail to save the statute and ignore COPA's plain language, this Court should reject them.

First, petitioner interprets COPA's serious value prong to apply only to material that lacks value for *older minors*. As the Third Circuit correctly held, this narrowing language is nowhere in the statute. Pet. App. 25a. In other statutes passed to protect younger minors from inappropriate material, Congress has specifically excluded older minors to protect their rights. *See* 116 Stat. 2766. Congress knew how to write "older" minors into COPA's serious value prong but chose not to. In addition, the government's narrowing construction clearly leaves younger minors – all minors from birth up to age 15 – unprotected from material that is harmful to them, thus undercutting the government's asserted interest in protecting all minors. Finally, more vigorous prosecution of the adult obscenity statute would be a far more narrowly tailored way to protect all minors from the most sexually

explicit speech than imposing criminal penalties on material protected for adults.

Second, the statute's plain language contradicts petitioner's view that the "commercial purposes" language can be narrowly construed to exclude sites that only "occasionally" publish harmful to minors material. As the Court of Appeals held, COPA applies "to Web publishers who have posted *any* material that is 'harmful to minors' ... even if a small part of his or her Web site displays such material." Pet. App. 29a. In fact, Congress specified *three times* that communications covered by COPA "include[] any material" that may be deemed harmful to minors. *See* 47 U.S.C. § 231(a)(1); § 231(e)(2)(B) (twice). Petitioner's interpretation would deny any meaning to that phrase. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("First, the Court will avoid a reading which renders some words altogether redundant.").

Third, it is not feasible to interpret COPA's "as a whole" language to require an evaluation of material "in the context of the entire Web site." Pet. Br. at 30. Though petitioner suggests that a Web site is no different than a magazine, many Web sites are much more akin to online libraries containing hundreds of magazines. Many sites archive all of their past content on a single Web site. In the physical world, an article is evaluated according to a single issue of a magazine. In the online world, is the government suggesting that an article must be evaluated according to every article ever published on the Web site? Such an interpretation could be practically impossible for the many sites with a great quantity of content.

In addition, almost all Web sites include links to content that resides on different computers throughout the world that are controlled by others. From the user's point of view, it is often difficult or impossible to tell which content resides on the host's Web site. *See* Pet. App. 128a, ¶17

("From a user's perspective, [the Web] may appear to be a single, integrated system."). The government has not clarified whether external links will be considered part of the "as a whole" evaluation, though it has ominously stated that "there may be other circumstances where the actions of the business displaying the communications has a distinct bearing on the context in which the material is displayed." Pet. Br. at 29. Thus, despite the government's half-hearted clarification, Web speakers will remain "unclear ... [about] what constitutes the denominator – that is, the material to be taken as a whole – in the context of the World Wide Web." 535 U.S. at 601 (Kennedy, J., concurring).

This Court has specifically rejected narrowing constructions in similar circumstances. As the Court explained in refusing to re-write the Communications Decency Act, courts should decline to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn.'" *Reno v. ACLU*, 521 U.S. at 884 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)). Just as the CDA could not be fixed, COPA cannot be rewritten to "'conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. at 884-85 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). To attempt such a major rewriting of the statute would clearly constitute a "'serious invasion of the legislative domain.'" *Reno v. ACLU*, 521 U.S. at 884 (quoting *United States v. National Treasury*, 513 U.S. 454, 479 n.26 (1995)).[18]

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[18] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government." *United States v. Reese*, 92 U.S. 214, 221 (1875).

IV. COPA'S AFFIRMATIVE DEFENSES DO NOT SAVE THE STATUTE, AND LESS RESTRICTIVE ALTERNATIVES ARE AVAILABLE TO PROTECT MINORS.

A. COPA's Defenses Pose Tremendous Burdens On Online Speakers And Users That Will Suppress Protected Speech.

As the district court correctly held, "[a] statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression." Pet. App. 151a. COPA's defenses are identical to those found insufficient by this court in *Reno v. ACLU*. They impose tremendous burdens on both Web speakers and users that substantially suppress protected speech, and thus do not save the statute.

1. COPA Would Require Web-Based Interactive Chat Rooms And Discussion Groups To Restrict Speech That Is Not Even Covered By The Statute.

The evidence showed that Web-based chat rooms and discussion groups are vitally important features that contribute to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Rielly Testimony). They are some of the "vast democratic for[a] of the Internet," providing Web users with equal access and an equal voice. *Reno v. ACLU*, 521 U.S. at 868. Hundreds of thousands of people have communicated with each other on plaintiffs' sites alone, which represent only a miniscule portion of the discussions occurring at any given moment on the Web. Yet COPA would require that users of any interactive forum provide a credit card or adult access code before entering the discussion – even if the discussion contains a wide range of speech that is not harmful to minors. As the district court held,

> the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. This has the effect of burdening speech in these fora that is not covered by the statute.

Pet. App. 156a.

Content providers utilizing interactive fora routinely select the topics that will be discussed by users. *Id.* As a result, the district court found that these providers cannot utilize COPA's "hosting defense," which immunizes from prosecution only those who are "engaged in the transmission, storage, retrieval, hosting, formatting or translation (or any combination thereof) of a communication made by another person, *without selection or alteration of the content of the communication.*" 47 U.S.C. § 231(b)(4) (emphasis added). COPA would thus curtail a vast number of online discussions on commercial Web sites, halting much of the "worldwide conversation" that is the Internet. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

2. COPA Unconstitutionally Forces Web Speakers To Choose Between Severe Criminal Penalties And The Substantial Financial Burdens Imposed By The Defenses.

COPA threatens any speaker on the Web who displays any material that is "harmful to minors" with severe criminal and civil sanctions. Faced with the risk of jail time for what they say on the Web, speakers are certain to "steer

far wide[] of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

As an initial matter, COPA's penalties will have a strong chilling effect even on those speakers who may be entitled to rely on an affirmative defense at trial. As this Court explained when striking down the Child Pornography Prevention Act ("CPPA"), "[t]he Government raises serious constitutional difficulties by seeking to impose on the petitioner the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." 122 S. Ct. at 1404; *see also Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996) (striking down the federal CDA, and noting that affirmative defenses "in no way shield[] a content provider from prosecution"), *aff'd*, 521 U.S. 1113 (1997).

Speakers who want to communicate to adults material that may be deemed harmful to minors are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses. As the district court held, the result is certain to be widespread self-censorship. Since content providers know that most users will not register to gain access to restricted speech, "the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 155a. Content providers depend on drawing a high level of traffic to their site to attract and retain advertisers and other investors. J.A. 144, 221 (Talbot, Hoffman Testimony). Many content providers would not bother to shoulder the burdens of setting up age verification systems that few if any users would utilize, and that would cause a drastic decrease in traffic. J.A. 331 (Barr Testimony). Instead, "content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites." Pet. App. 156a.

In addition, the evidence established that content providers who institute credit card verification would incur substantial start-up and per-transaction costs. J.A. 382-383 (Farmer Testimony). Content providers may have to charge the user's card to allow access to content, as petitioner was unable to prove that credit card companies will verify a credit card in the absence of a commercial transaction. J.A. 497 (Alsarraf Testimony). If a content provider used third-party adult verification through adult access codes, users would also be required to pay a fee to access material that speakers wish to make available for free, inevitably decreasing traffic to the site. J.A. 440 (Alsarraf Testimony).

In striking down the CDA in *Reno v. ACLU*, this Court held that the prohibitively high economic burden of age verification "must inevitably curtail a significant amount of adult communication on the Internet." 521 U.S. at 877. This Court has repeatedly held that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). The government's ability to use financial regulation to impose content-based burdens on speech "raises the specter that petitioner may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating a statute requiring theater owners, to avoid prosecution, either to "restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable").

3. Any Mandatory Registration Will Unconstitutionally Prevent Or Deter Web Users From Accessing Protected Speech.

Even assuming Web speakers would not self-censor for fear of criminal penalties and would shoulder the high

financial burden of the defenses, COPA would deter a substantial number of adult Web users from accessing restricted speech. The district court found that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials." Pet. App. 155a. Of course, for all adults who do not have credit cards, COPA operates as a complete ban. *See Reno v. ACLU*, 521 U.S. at 874-75.

COPA will deter most adults (even those with credit cards) from accessing restricted content because Web users are simply unwilling to provide identifying information in order to gain access to content. To utilize either COPA's adult access code or credit card defense, Web users would have to provide identifying information before accessing protected speech, perhaps to an untrusted third-party Web site. J.A. 379 (Farmer Testimony). Plaintiffs testified that their customers would simply forgo accessing their material entirely if forced to apply for an adult access code, provide a credit card number, or pay for content. J.A. 330-31, 344, 367-68, 370 (Barr, Rielly, Tepper Testimony). The record shows that up to 75% of Web users are deterred by registration requirements. J.A. 227, 238 (Hoffman Testimony). Another peer-reviewed study showed that two-thirds of consumers would not give up personal information to Web sites even in exchange for money. J.A. 227, 238 (Hoffman Testimony).

Web users who wish to access sensitive or controversial information are even less likely to register to receive it. For example, Dr. Tepper testified that persons who access the Sexual Health Network "have already been too embarrassed or ashamed to ask even their doctor. I think if they come across this barrier to access, that they are just not going to take the next step and put their name and credit card information in." J.A. 344 (Tepper Testimony). The use of credit card or adult access code verification may also require users to pay a fee, further increasing COPA's

deterrent effects. J.A. 396 (Farmer Testimony). The COPA and NRC Reports, both commissioned by Congress, also found that mandatory age verification would deter substantial numbers of adult users. *See* discussion *supra* at Statement of the Case, Section B.

Case law is clear that this form of inhibition on adult access to protected speech renders a statute unconstitutional.[19] *See Denver Area Telecommunications Consortium*, 518 U.S. at 746 (holding that statute blocking certain cable channels and requiring users to request that those channels be unblocked unconstitutionally burdened subscribers' access to information); *Reno v. ACLU*, 521 U.S. at 857 n.23; *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operators to scramble channels as a default); *Lamont v. Postmaster General,* 381 U.S. 301, 307 (1965) (invalidating on First Amendment grounds a statute requiring that individuals request certain mail in writing, holding the statute would have "a deterrent effect"); *Martin v. City of Struthers,* 319 U.S. 141, 148 (1943) (holding that statute prohibiting door-to-door distribution of information violated First Amendment rights of "those desiring to receive it").

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[19] Petitioners wrongly rely on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), to argue that COPA's deterrent effects do not render it unconstitutional. Unlike COPA, the statute upheld in that case did not threaten protected speech with criminal sanctions, and was not subjected to strict scrutiny. In addition, the court interpreted that statute to minimize any deterrent on adult access by allowing library patrons to gain unfettered access to all Internet speech. Indeed, the case confirms that user-based filters are a less restrictive alternative to COPA.

B. COPA's Burden On Speech Fails Strict Scrutiny and Is Overbroad.

As illustrated above, given the tremendous burden COPA imposes on the protected speech of adults, COPA is far from narrowly tailored and thus clearly fails strict constitutional scrutiny. Despite the government's assertions, contradicted by the trial record, COPA's burden on speech is far greater than that imposed by "blinder rack" statutes that some states have used to restrict harmful to minors materials in bookstores and vending machines. *See* Pet. Br. at 22.

None of the blinder rack statutes deal with the unique problems presented by regulation of harmful to minors materials on the Internet. *Reno v. ACLU*, 521 U.S. at 877. As the Third Circuit held, a blinder rack statute "does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens." Pet. App. 38a. First, unlike COPA, blinder racks do not require adults to pay for speech that would otherwise be accessible *for free*. Second, blinder racks do not require adults to relinquish their anonymity in order to access protected speech.[20] Third, blinder racks do not create a potentially permanent electronic record that an individual has accessed restricted and stigmatized materials. Fourth, the number of individual speakers and the sheer quantity of speech threatened by COPA far exceeds that affected by any single state law. For these reasons and others, federal courts around the country have now struck down *seven* state harmful to minors display laws modeled on COPA and enacted to govern the Internet

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[20] *See, e.g., M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983) (requiring that harmful to minors materials be kept behind blinder racks that cover the lower two-thirds of the material, but that allow adults to browse the materials freely); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985) (requiring opaque covers and sealing of harmful to minors materials); *Crawford v. Lungren*, 96 F.3d 380, 388 (9th Cir. 1996) (prohibiting sale in newsracks).

because they unconstitutionally deter adults from accessing protected speech.[21] The government conveniently ignores these cases in its brief.

Finally, the government's position on venue and community standards distinguishes COPA from state statutes and exacerbates COPA's overbreadth. The government has conceded that regardless of whether COPA is read to apply local or national community standards – a question ultimately left unanswered by this Court in its prior opinion – "the actual standard applied is bound to vary by community." 535 U.S. at 596 (Kennedy, J., concurring); Appellant's Brief on Remand, at 34-35. The government asserts that it could prosecute under COPA in any venue in which a Web site can be viewed. Appellant's Brief on Remand, at 33 n.11 (citing 18 U.S.C. § 3237(a)).

Given the variation in views between communities, "the choice of venue may be determinative of the choice of standard. The more venues the Government has to choose from, the more speech will be chilled by variation across communities." 535 U.S. at 602 (Kennedy, J., concurring). Self-censorship is the only option for Web speakers that want to assure themselves that they will not be prosecuted in the most conservative communities:

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[21] *See Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (Michigan); *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F. 3d 1149 (10th Cir. 1999) (New Mexico); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (Virginia); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002) (Vermont); *American Civil Liberties Union v. Napolitano*, No. Civ. 00-505 TUC ACM (D. Ariz. June 14, 2002) (order granting permanent injunction) (Arizona); *Bookfriend v. Taft*, No. C3-02-210 (S.D. Ohio Aug. 2, 2002) (granting temporary restraining order) (Ohio); *see also Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D. S.C. 2003) (South Carolina).

> A Web publisher in a community where avant garde culture is the norm may have no desire to reach a national market; he may wish only to speak to his neighbors; nevertheless, if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web.

Id. at 595-96 (Kennedy, J., concurring). Given the broad range of protected speech targeted by COPA, the government's ability to prosecute Web speakers in any venue clearly exacerbates the statute's overbreadth. COPA poses a very strong risk that most Web speakers will "remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. at 872; *see also* Pet. App. 161a.

C. COPA Is An Ineffective Method For Achieving The Government's Interest, And Less Restrictive, More Effective, Alternatives Are Available.

The lower courts correctly concluded that COPA would be ineffective at protecting children from harmful materials, and that more effective alternatives are available. Pet. App. 47a-48a, 159a-161a. Specifically, COPA is ineffective because "minors may be able to gain access to harmful to minors material on foreign Web sites, non-commercial sites, and online via protocols other than http." Pet. App. 159a, 45a. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for [petitioner's] purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). Petitioner bears the burden of showing that the scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broadcasting*

Sys., Inc. v. FCC, 512 U.S. 622, 624 (1994); *see also Florida Star v. B.J.F.* 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as ... justifying a restriction upon truthful speech, when it leaves appreciable damage to [petitioner's] supposedly vital interest unprohibited."); *Sable*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Especially given the recent Congressional reports, it is clear that petitioner did not meet this burden.

The record shows, and both reports by Congress now confirm, that many alternative means are more effective at addressing minors' access to inappropriate material. *See* Statement of Case, *supra* at Sections A.5., B. These options include the use of filtering software, the promotion of Internet education and high-quality Internet material for children, and the vigorous enforcement of existing laws. All of these approaches are notably less restrictive than COPA's criminal ban. *See Reno v. ACLU*, 521 U.S. at 879; *Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television); *Playboy,* 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operators to scramble channels as a default). Three new federal laws, in addition to the existing obscenity and child pornography laws, extend the range of available protections for minors. *See supra* at I. Given all of these options, there can be no doubt that COPA's criminal penalties fail strict scrutiny.

CONCLUSION

For the reasons stated above, this Court should affirm the preliminary injunction against the Child Online Protection Act.

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(16)

No. 03-218

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
I. COPA's screening obligation applies to a narrow and constitutionally permissible range of material	2
A. COPA's screening obligation does not apply to the serious treatment of sexual issues	4
B. COPA does not apply to a Web operator's hosting of chat rooms and discussion boards	7
C. COPA constitutionally applies to material that is displayed in order to generate a profit, but is not for sale	8
D. The "as a whole" requirement, properly applied, provides fully adequate constitutional protection	9
II. The government's common sense interpretations of COPA are consistent with COPA's text and Congress's intent	10
A. COPA's screening obligation does not apply to material that has serious value for older minors	10
B. COPA does not apply to Web operators who only occasionally post harmful material	11
C. COPA's "as a whole" requirement is sufficiently clear and administrable	12
III. COPA does not impose an unreasonable burden on Web operators or Web viewers	13
A. Adult IDs and credit cards involve modest burdens	13
B. COPA's modest burdens are comparable to limitations on obtaining adult material in other settings	15

TABLE OF CONTENTS—Continued:

	Page
IV. COPA is effective and no alternative is as effective	16
A. COPA is the most effective way to address domestic commercial pornography on the web	16
B. Filtering software can complement COPA, but it cannot function as a suitable replacement	17
C. The other laws cited by respondents are insufficient to fulfill the government's compelling interest in protecting minors from harmful material	19
Conclusion	20

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Cases:

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47 U.S.C. 231(d)(1) 15
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47 U.S.C. 231(e)(6) 2
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REPLY BRIEF FOR THE PETITIONER

The Child Online Protection Act (COPA) addresses a serious and escalating national problem. A staggering number of pornographic sites are on the World Wide Web; most offer free pornographic teasers that are designed to lure viewers to purchase other material on the site; and millions of minors are viewing those teasers, many deliberately, many inadvertently. COPA is a narrowly tailored response to that problem, which has been recognized as urgent and compelling by all three branches of our Government on numerous occasions. In accordance with the guidance furnished by the Court in *Reno* v. *ACLU*, 521 U.S. 844 (1997), COPA shields minors from the narrow category of material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors; it covers only commercial enterprises that regularly display such pornographic material; and it applies only on the Web, where operators can easily place harmful

material behind age verification screens, and adults can easily obtain access to such material by presenting an adult ID or a valid credit card.

For more than two decades, numerous States have enforced laws that require stores to place the same category of material behind blinder racks, in sealed wrappers, in opaque covers, or behind the counter. Courts of appeals and state courts have consistently upheld such laws on the ground that they further the government's compelling interest in protecting minors from material that is harmful to them, without preventing adults from gaining access to such material. COPA is constitutional because it pursues the same objective in a comparable manner.

Respondents argue that COPA is unconstitutional for four reasons: First, that COPA's screening obligation applies to an unacceptably broad range of material even if the government's interpretations of COPA are correct, Resp. Br. 28-37; Second, that the government's interpretations are incorrect and that COPA, in fact, applies to a broader range of material, *id.* at 37-39; Third, that COPA's screening obligation imposes an undue burden on Web operators who display harmful material and adults who seek access to it, *id.* at 40-48; and Fourth, that there are less restrictive and more effective means than COPA to further the compelling interest in shielding minors from harmful material. *Id.* at 21-24, 48-49. Each contention is without merit.

I. COPA'S SCREENING OBLIGATION APPLIES TO A NARROW AND CONSTITUTIONALLY PERMISSIBLE RANGE OF MATERIAL

COPA's screening obligation applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. 47 U.S.C. 231(e)(6). In evaluating whether material falls within that three-part test, the relevant question is whether the material has those characteristics with respect

to normal 16 year-olds. Gov't Opening Br. 29-32. And, in making that determination, the material must be evaluated in the context in which a Web operator presents it. *Id.* at 26-29.

Respondents argue that, even under the government's interpretation of COPA, it applies to an unacceptably broad range of material. Resp. Br. 28-37. The congressional harmful-to-minors definition, however, is firmly grounded in this Court's decisions. It parallels the harmful-to-minors definition that this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), as an appropriate standard for States to use in restricting the sale of harmful material to minors. It tracks the definition that States, in reliance on *Ginsberg*, have used in requiring local stores to place harmful material in blinder racks, in opaque covers, in sealed wrappers, or behind the counter. *E.g.*, *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is patterned on the three-part obscenity definition that this Court adopted in *Miller* v. *California*, 413 U.S. 15, 24 (1973), except that COPA requires each of the obscenity inquiries to be made with respect to minors rather than adults.

In adopting the three-part *Ginsberg/Miller* standard, Congress was carefully following the guidance prescribed by this Court. In doing so, it sharply limited the scope of COPA's screening obligation to material that society has always viewed as inappropriate for viewing by minors. The House Report on COPA explains that the screening obligation applies only to materials "that are clearly pornographic" and not to "entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how controversial they may be for their political or sexual viewpoints." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). The Senate Report also makes it clear that the screening obligation does not apply to "public health information, art, literature, and political information."

S. Rep. No. 225, 105th Cong., 2d Sess. 13 (1998). COPA's screening obligation therefore applies only to a narrow and constitutionally permissible range of material. Respondents' contrary arguments are each based upon unfounded exaggerations of COPA's scope.

A. COPA's Screening Obligation Does Not Apply To The Serious Treatment Of Sexual Issues

1. Respondents' assertion that COPA's screening obligation is too broad because any frank discussion about a sexual issue may be found by a jury to be harmful to minors, Resp. Br. 31-35, is unwarranted. A serious discussion about a sexual issue has serious value for older minors and is therefore excluded from COPA's coverage as a matter of law.

It is true that some communities regard sex education as too controversial to be taught in public schools, and some individuals and groups object to the promotion of certain points of view about sexual issues. Resp. Br. 32-33. But COPA does not apply to material simply because it happens to address a controversial or sensitive subject. No matter how controversial or disfavored, material falls outside COPA as long as it has "'serious literary, artistic, political, or scientific value' for a legitimate minority of older, normal adolescents." *American Bookseller Ass'n*, 372 S.E.2d at 624. Nor is that determination left to a jury's unbridled discretion. The courts must independently apply, "as a matter of law, a national floor" with respect to when the serious value standard is satisfied. *Reno* v. *ACLU*, 521 U.S. at 873.

More than 20 years ago, the Virginia Supreme Court performed that precise function, holding that Virginia's prohibition against public display of harmful-to-minors material did not apply to two books containing explicit but serious discussions of sexual issues: Alex Comfort & Jane Comfort, *The Facts of Love* (1979), and *The New Our Bodies, Ourselves* (Jane Pincus & Wendy Sanford, eds. 1984). See *American Bookseller Ass'n*, 372 S.E.2d at 622. Because

COPA incorporates the serious value prong of state display laws, H.R. Rep. No. 775, *supra*, at 13, the result under COPA would be the same.

2. Respondents make a comparable misjudgment in contending that the material they offer on their Web sites demonstrates that COPA has an unjustifiable scope. See Resp. Br. 2-5, 29-30. All of that material which seriously addresses sexual issues is excluded from COPA's coverage. For example, the articles on the Sexual Health Network that address sexual issues for persons with disabilities have serious scientific value for many older minors. See Sexual Health Network, Inc., *Sex Therapy Expert Education* (visited Feb. 18, 2004) <http:/www.sexualhealth.com>. Likewise, Patricia Nell Warren's date rape article has serious literary value for many older minors, see 2 C.A. App. 732-736, and Planet Out's Dr. Ruthless show addresses topics that have serious scientific value for many older minors. *Id.* at 658.

Other examples furnished by respondents are more explicit and provocative, but still fall within the broad serious value exclusion that Congress established. For example, Blackstripe's essay on racism and sexuality has serious literary and political value for a legitimate minority of older minors, C.A. App. 753-757, and A Different's Light's essay on sexual shame has serious literary value for a legitimate minority of older minors. *Id.* at 609-612. As those examples illustrate, articles that provide information or an intellectual perspective on a sexual issue fall outside COPA's coverage, no matter how controversial the viewpoint or provocative the method of expression.

The government previously identified three of respondents' exhibits as borderline examples that might not be excluded from COPA's coverage as a matter of law. Reply Br. at 9, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2001) (No. 00-1293) (citing 2 C.A., App. 617-620, 710-713, 745-748). As the Solicitor General then explained at oral argument, however, that evaluation was based on a review of the exhibits put forward by respondents extracted from their context, and that material would be seen differently when examined in the context of the Web site from which they were extracted. *Ashcroft* v. *ACLU*, Arg. Tr. 22-23. For example, in the context of the ArtNet Web site, Serrano's photographs likely have serious artistic value for a legitimate minority of older minors. See 2 C.A. App. 710-713. In the context of the Salon Web site, Susie Bright's column likely has serious literary value for a legitimate minority of older minors. See *id.* at 617-620.[1]

Thus, far from demonstrating that COPA has an unjustifiable scope, respondents' examples actually underscore the point that COPA's restrictions exempt material that seriously addresses sexual issues and is limited to material that is clearly pornographic. On the other hand, examples of such clearly pornographic material on the Web, which is what Congress was targeting when it enacted COPA, are included in the government's exhibits. Those exhibits demonstrate the compelling need for COPA's screening requirement. 2 C.A. App. 758-812.

3. Respondents stretch to formulate the contention that the exclusion of material that has serious literary, artistic, political, or scientific value is insufficient because it does not expressly exclude material that has serious educational value. Resp. Br. 35. But that is simply another straw man. Material that has serious educational value would fall within one or more of the identified categories—all of which are intended to be read broadly. For example, respondents express concern that sex education might not be exempted

[1] Because the RiotGirrl site is no longer in existence, a determination whether the excerpt is harmful to minors when viewed in context cannot be made. See 2 C.A. App. 745-748.

from COPA's screening obligation, *ibid.*, but legitimate sex education has serious scientific value for older minors.

Respondents next fault COPA for failing to exempt material that has entertainment value. Resp. Br. 35. This Court has never intimated that Congress would be required to create such an elastic exception. Material intended to entertain will generally fall outside of COPA because it either does not appeal to the prurient interest, does not contain patently offensive descriptions of sexual acts, or has serious literary or artistic value. But graphic pornography is not exempt from COPA simply because some viewers might find it "entertaining," *i.e.*, diverting or engaging. The *Miller* Court did not categorically exempt material that has entertainment value from the definition of obscenity, 413 U.S. at 24, presumably for the obvious reason that such a vague term could include virtually anything. And Congress acted within constitutional limits in following the same approach in COPA.

B. COPA Does Not Apply To A Web Operator's Hosting Of Chat Rooms And Discussion Boards

Respondents contend that COPA's screening obligation is excessively broad because it applies to chat rooms and discussion boards. Resp. Br. 29-30, 40-41. In particular, respondents argue that, because there is no way to place harmful postings behind an age verification screen without also placing non-harmful postings behind such a screen, COPA's screening obligation has the impermissible effect of burdening communications that are not harmful to minors. *Id.* at 40-41. That argument ignores the express exemption from COPA for chat rooms and discussion boards.

Under that exemption, COPA's screening obligation does not apply to persons to the extent that they are "engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4). That exemption

relieves a Web operator from any duty to screen material that visitors post in chat rooms or on discussion boards. As long as a Web operator is simply performing the typical function of hosting a chat room or discussion board and does not select or alter the content of individual postings, COPA's screening obligation is not triggered.

Respondents are mistaken in asserting that this exemption is lost when the Web operator selects a *topic* for discussion. Resp. Br. 41. That common practice still leaves "the selection" of the "*content*" of a particular posting up to the person visiting the chat room or discussion board. A different rule might apply if the topic, by definition, invited only harmful-to-minors communications (*e.g.*, "post your most lurid and arousing xxx fantasies"). But barring that circumstance, the selection of a topic does not involve the selection of content within the meaning of the exemption. Respondents' alternative reading would eviscerate the exemption and force Web operators to undertake the very pre- screening of chat room and discussion board postings that COPA intended to exempt. Respondents' reading would also violate the principle that statutes should be read to avoid constitutional problems, rather than to create them. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)—a principle respondents repeatedly ignore.

C. COPA Constitutionally Applies To Material That Is Displayed In Order To Generate A Profit, But Is Not For Sale

Respondents contend that COPA is unconstitutional because it applies to material that Web operators do not offer for purchase. Resp. Br. 30-31. But Congress had no intention to limit COPA's coverage to material offered for purchase because that would have allowed pornographic Web sites to continue their pervasive practice of making available free sexually explicit teasers to minors of all ages.

Moreover, other strategies for profiting from free pornography have begun to flourish that would exploit such a loophole. For example, some Web sites now display free pornographic material obtained from larger sites and earn revenue by channeling traffic to the larger sites; for every channeled user who subscribes to the larger site, the smaller site receives a percentage of the fee. Similarly, some Web sites post free pornographic material and then automatically forward their exit traffic to other sites in return for a per-customer fee. See Computer Science and Telecommunications Board, National Research Council, *Youth, Pornography, and the Internet* 73, 75 (Dick Thornburgh & Herbert S. Lin eds., 2002). These emerging businesses pose a serious danger to minors and demonstrate the wisdom and constitutionality of Congress's judgment not to limit COPA's screening obligation to material offered directly for purchase.

D. The "As A Whole" Requirement, Properly Applied, Provides Fully Adequate Constitutional Protection

Respondents contend that the "as a whole" requirement, as interpreted by the government, provides insufficient constitutional protection. Resp. Br. 35-37. But the "as a whole" requirement ensures that material is subject to COPA's screening requirement only when it is harmful to minors in the context in which it is presented. That approach faithfully tracks this Court's approach in comparable circumstances, *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam); *Roth* v. *United States*, 354 U.S. 476, 490 (1957), and this Court has given no indication that it would not provide constitutionally sufficient protection in the context of the Internet medium.

Respondents object to the government's statement in its opening brief that if a Web site invites persons to "click for xxx pictures," and that click sends the viewer to a portion of the site that contains explicit pictures, the highlighting

feature would be an important part of the context in which the highlighted material is presented. Resp. Br. 36 (referring to Gov't Opening Br. 29). The government's explanation, however, simply articulates an application of the principle established in *Ginzburg* v. *United States*, 383 U.S. 463, 470-471 (1966), that when material is *promoted* as sexually arousing, rather than for its intellectual content, a court may take that factor into account in deciding whether the material is obscene. That same principle applies in deciding whether material is harmful to minors. See 47 U.S.C. 231(e)(6)(A) (part of test is whether the material "is designed to pander to[] the prurient interest").

Respondents incorrectly assert that COPA's contextual approach would mean that the coverage standard would vary depending on the volume of material on a site. Resp. Br. 37. On the contrary, the material would be examined in light of the general character of the Web site, not on the basis of the number of works on the site.

II. THE GOVERNMENT'S COMMON SENSE INTERPRETATIONS OF COPA ARE CONSISTENT WITH COPA'S TEXT AND CONGRESS'S INTENT

Respondents contend that COPA should be interpreted much more broadly than the government contends. Resp. Br. 37-39. That is an unjustified attack on a carefully limited statute.

A. COPA's Screening Obligation Does Not Apply To Material That Has Serious Value For Older Minors

Respondents contend that COPA's serious value component does not incorporate an older minor standard. Resp. Br. 37. But Congress enacted COPA against the background of state harmful-to-minors display laws that had been repeatedly construed by the judiciary to exclude material that has serious value for older minors. *American Booksellers Ass'n*, 372 S.E.2d at 624; *Davis-Kidd Booksellers*,

Inc. v. *McWherter*, 866 S.W.2d 520, 533 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-1505 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). Congress deliberately borrowed the "familiar" definition of "harmful to minors" from those laws and consistent judicial interpretations. H.R. Rep. No. 775, *supra*, at 13 (citing cases),

Respondents err in contending that the older minor standard is inconsistent with Congress's intent to protect minors who are younger than 16. Resp. Br. 37. Just like state display laws, after which it was patterned, COPA protects *all* minors from material that lacks serious value for older minors. In that way, COPA protects all minors from the most harmful material on the Web, without interfering with the interest of older minors in obtaining access to material that has serious value for them. No law would represent a perfect fit with every age; Congress adopted the most practical, and judicially approved, constitutional approach.

B. COPA Does Not Apply To Web Operators Who Only Occasionally Post Harmful Material

Respondents argue that COPA applies to persons who only occasionally display harmful material. Resp. Br. 38. But COPA's commercial purposes definition limits COPA's screening obligation to persons "engaged in the business" of making harmful-to-minors communications, 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making harmful-to-minors communications only if that is "a regular course" of that person's business. 47 U.S.C. 231(e)(2)(B). That "regular course" requirement is modeled on a similar "regular course" requirement in the federal prohibition against distribution of obscenity. H.R. Rep. No. 775, *supra*, at 27 (discussing 18 U.S.C. 1466(b)). Well before COPA was enacted, that requirement had been judicially construed to limit the prohibition to persons who "regularly traffic" in obscenity. *United States* v. *Skinner*, 25 F.3d 1314, 1319 (6th Cir. 1994). Because of the "regular course" requirement, a person is covered by COPA only by making regular harmful-to-minors communications. A person who occasionally makes such a communication is not covered.

Respondents urge a vastly broader interpretation on the ground that anything less would render meaningless Congress's intent to cover "any" harmful material. Resp. Br. 38. (citing 47 U.S.C. 231(a)(1) and (e)(2)(B)). But Congress's intent must be determined based on all parts of the statute read together. When COPA is read as a whole, COPA's screening obligation manifestly applies only to Web operators who regularly display harmful material. 47 U.S.C. 231(e)(2)(B). Once a Web operator crosses that threshold, he must then place "any" harmful material on his site behind an age verification screen. 47 U.S.C. 231(a)(1).

C. COPA's "As A Whole" Requirement Is Sufficiently Clear And Administrable

1. Respondents contend that COPA's "as a whole" requirement is impractical to administer because some Web sites contain many pages of material. Resp. Br. 38. But a Web operator can reasonably be expected to be familiar with the general character of his Web site and the overall nature of his communications. Those individuals are in the best position to know whether they are in the business of posting harmful-to-minors material. Moreover, COPA imposes its screening obligation only upon a person who "knowingly and with knowledge of the character of the material" makes harmful communications. 27 U.S.C. 231(a)(1). A person who truly lacks such knowledge cannot be held liable under COPA. Courts are surely capable of providing additional assurance that these limitations are respected.

2. Respondents mistakenly argue that COPA leaves unclear whether a Web operator's links to other sites will be considered in the "as a whole" evaluation. Resp. Br. 39. That argument ignores the plain language of the statute.

Under 47 U.S.C. 231(b)(3), a person does not make a covered communication when he provides an "Internet information location tool," and an information location tool includes a "link." 47 U.S.C. 231(e)(5). Thus, under COPA, a person does not make a covered communication when he links his Web site with another. That exemption reflects a congressional judgment that a Web operator's responsibility is limited to ensuring that his own site complies with COPA; he is not responsible for the failure of another Web site to comply with COPA's screening requirement. It would therefore be inconsistent with Section 231(b)(3) and its purpose to consider a Web site's links in making the "as a whole judgment."

III. COPA DOES NOT IMPOSE AN UNREASONABLE BURDEN ON WEB OPERATORS OR WEB VIEWERS

Notwithstanding respondents' rhetoric to the contrary, Resp. Br. 41-45, the burdens of COPA's affirmative defenses are modest, and well within the constitutional limits that apply to legislation that furthers a compelling interest.

A. Adult IDs And Credit Cards Involve Modest Burdens

1. A Web operator may comply with COPA by requiring either an adult ID or a credit card as a condition of obtaining access to harmful material. Neither system imposes an undue burden on the Web operator or Web user.

Numerous services provide adult IDs. Pet. App. 141a. One such service will provide a screening service at no cost to the Web operator. *Ibid.* In fact, the Web operator can earn commissions by referring users to the service. *Ibid.* An adult ID system is also easy and relatively inexpensive for the viewer to use. When the viewer comes across screened material, he can immediately click on a link to the adult ID service, purchase an adult ID for $16.95 good for an entire year, and return immediately to the site. *Id.* at 141a-142a.

The cost of credit card verification systems begin as low as $300, Pet. App. 138a, a cost that millions of Web

businesses, including respondents A Different Light, Salon, and PlanetOut, have been willing to absorb. A credit card system also involves transaction costs, but those costs can be kept to a minimum by using a credit card service just once per year for each user and then storing the number on the site. *Id.* at 140a. Credit card services currently charge Web operators 15 to 25 cents for each transaction. *Id.* at 139a. Under a credit card system, users need not incur a cost.[2]

2. Respondents assert that 75% of users would be deterred by registration requirements. Resp. Br. 44. The district court did not credit that evidence, however, and found only that sites could lose "some adult users" of material behind age verification screens. Pet. App. 147a. The court's failure to credit respondents' evidence is understandable. Millions of persons use adult IDs and credit cards on the Web. Pet. App. 142a; 2 C.A. App. 503-504. That experience undermines respondents' dire predictions about the effect of registration requirements, which also ring hollow inasmuch as respondents such as Salon require registration in order to obtain access to some of their content. *Salon.com* (visited Feb. 11, 2004) <http://sub.salon.com/registration>. *The New York Times* and *The*

[2] Respondents claim that they might have to charge users for credit card verification because credit card services may be unwilling to perform authorization-only verifications. Resp. Br. 43. But the reluctance of credit card services to perform authorization-only transactions exists because they currently profit primarily from user charges, rather than authorization fees. 2 C.A. App. 497. There is no evidence that credit card services would be unwilling to perform authorization-only transactions if Web operators would pay a sufficient amount to make that service profitable. It would be up to the Web operators whether to pass that additional cost on to users or absorb the cost themselves. Respondents also assert that credit card access will not help anyone who does not have a credit card, Resp. Br. 44, but respondents have not offered any evidence on the number of adult Web users who both lack a credit card and cannot obtain one. In any event, a person who does not have a credit card can obtain an adult ID with a driver's licence or a passport. Pet. App. 142a.

Washington Post, in fact, impose registration requirements for most of their content.

B. COPA's Modest Burdens Are Comparable To Limitations On Obtaining Adult Material In Other Settings

The modest burdens associated with COPA's affirmative defenses are analogous to the burdens associated with obtaining access to adult material in other settings, such as adult book stores, night clubs, and R-rated movies. It is common in those settings to have to furnish proof of age. The same is true with respect to state display laws that protect minors from material that is harmful to them.

Respondents argue that COPA imposes more significant burdens than state display laws because COPA requires adults to pay for material that otherwise would be free and imperils an adult's anonymity. Resp. Br. 46. But millions of people seeking access to pornographic material have been willing to pay the minimal cost of an adult ID, and a credit card system need not cost the user anything. Moreover, a person retains greater anonymity using an adult ID or credit card in the privacy of his home than he does pulling a magazine out of a blinder rack in a public place and paying for it in a face-to-face transaction, quite often in convenience stores equipped with a camera or closed-circuit television system. That is particularly true since COPA requires Web operators to maintain the confidentiality of information that is provided to them for screening purposes. 47 U.S.C. 231(d)(1). Credit cards are routinely used to purchase books, rent videos, or buy pharmaceuticals in the context of no greater confidentiality protections.

Respondents' position thus reduces to the argument that a law that serves an objective that all three Branches of the Nation's government have recognized as compelling is unconstitutional if it imposes any burden, no matter how common or reasonable, on adults. This Court, however, has repeatedly held that Congress has authority to enact laws

that are narrowly tailored to protect minors from harmful material. *Reno* v. *ACLU*, 521 U.S. at 864-865; *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Ginsberg*, 390 U.S. at 639. That authority necessarily includes the power to place reasonable burdens on adults when that is necessary to protect minors from harmful material. Any other rule would strip Congress of the ability to vindicate that compelling interest.[3]

IV. COPA IS EFFECTIVE AND NO ALTERNATIVE IS AS EFFECTIVE

A. COPA Is The Most Effective Way To Address Domestic Commercial Pornography On The Web

Respondents err in arguing that COPA is unconstitutional because it may not eliminate entirely access to pornography on foreign Web sites. Resp. Br. 48-49. It is true that, despite COPA's application to communications in "foreign commerce," 47 U.S.C. 231(a)(1), enforcement of COPA against foreign sites may involve practical difficulties, just as it may be more difficult to enforce other U.S. laws abroad. The proliferation of freely accessible pornography on commercial domestic Web sites, however, is itself a major problem, and Congress could reasonably determine that it bears a special responsibility to protect minors who have access to the Web from harmful-to-minors material that originates in

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[3] Respondents briefly renew their objection to COPA's reliance on community standards. Resp. Br. 47. But this Court has already held that COPA's reliance on community standards does not itself render COPA facially overbroad. *Ashcroft* v. *ACLU*, 535 U.S. 564, 585 (2002). COPA's community standards requirement may be appropriately implemented through an instruction that directs jurors to apply community standards without referring the jury to a particular geographic community. *Id.* at 576 (plurality opinion). To the extent the Court concludes that it is constitutionally necessary, COPA may also be validly implemented by directing a jury to apply a national adult standard with respect to what is harmful to minors. See 535 U.S. at 589 (O'Connor, J.); *id.* at 589-590 (Breyer, J.) (citing H.R. Rep. No. 775, *supra*, at 28).

the United States. Congress was entitled to address that phase of the problem with the most effective means possible— COPA's mandatory screening obligation.

The successful implementation of COPA domestically, moreover, can serve as a catalyst for further action. If the United States is successful in requiring pornographic businesses that operate in this country to place harmful material behind age verification screens, it will facilitate the government's ability to seek assistance from foreign countries to address the phase of the problem that is associated with foreign Web sites.

B. Filtering Software Can Complement COPA, But It Cannot Function As A Suitable Replacement

1. Contrary to respondents' contention, the use of filtering software is not an adequate substitute for COPA's mandatory screening obligation. Resp. Br. 49. As applied to domestic Web sites, reliance on filtering software alone would have numerous deficiencies and would not be nearly as effective. Under respondents' proposal, for example, no one would have an obligation to place filtering software on a computer. Minors could therefore obtain access to harmful material on a friend's computer or on other computers that lack blocking software. Filtering software blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. Minors can find ways to defeat blocking devices. See Haselton, Bennett, *WINnocence* (Nov. 9, 2003) <http://www.peacefire.org/info/winnocence.shtml> (directions for disabling leading software programs). Software can be expensive for parents to purchase and difficult for them to operate, and it must be updated periodically at an additional cost. Unfortunately, software always lags behind the latest proliferation of new pornography, and commercial pornographers have a strong incentive to outpace filtering software in order to generate additional traffic. Because COPA does not have those

deficiencies, it is far more effective as applied to domestic Web businesses that regularly display harmful material.

Moreover, the government not only has an interest in aiding parents who wish to protect their children from the harmful effects of pornographic material. It also has an independent interest in the well being of the Nation's minors. *Reno* v. *ACLU*, 521 U.S. at 865. Reliance on the voluntary use of filtering software by parents, many of whom lack the skill, time, energy, or motivation to use it effectively, would not vindicate that independent yet important national interest.

Respondents also ignore the critical point that COPA and filtering software do not present an either-or choice. Both can work together to address the serious problem of pornography on the Internet, and that comprehensive approach is far more effective than reliance on filtering software alone.

2. The reports issued by the Commission on Child Online Protection (COPA Commission) and the National Research Counsel (NRC), relied on by respondents (Resp. Br. 14-17), do not affect the validity of Congress's judgment that COPA is necessary to further the government's compelling interest in protecting minors from harmful material. Congress established the COPA Commission to study methods to help reduce access by minors to harmful material, 47 U.S.C. 231 note, and authorized the Attorney General to request NRC to study the same issue. Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 901, 112 Stat. 2991. Both entities issued reports to Congress. See Commission on Child Online Protection, *Report to Congress* (2000); *Youth, Pornography, and the Internet, supra.* Respondents argue that the reports support a preference for filtering software and other methods over COPA. Resp. Br. 14-17. They are simply incorrect.

While Congress asked the COPA Commission and the NRC to prepare reports, the reports reflect the views of

those entities, not Congress. The reports are not "congressional reports," Resp. Br. 14, and they were not intended to substitute for congressional hearings and findings. *Id.* at 15 n.4. Before enacting COPA, both the Senate and the House held hearings, and Congress made its own findings based on those hearings. See Gov't Opening Br. 3; S. Rep. No. 225, *supra*, at 8-9; 47 U.S.C. 231 note. This Court owes deference to Congress's legislative judgment expressed in a statute approved by Congress and the President.

In any event, both reports detail the deficiencies of filtering software and both recommend against relying on filtering software alone. *Report to Congress*, *supra*, at 9, 21, 45; *Youth, Pornography and the Internet*, *supra*, at 301-302. And while both reports voice concerns about COPA, neither challenges COPA's fundamental premise and national legislative judgment—that COPA is the most effective method of protecting minors from domestic commercial pornography on the Web, and that COPA and filtering software in combination are far more effective in protecting minors than filtering software alone.

C. The Other Laws Cited By Respondents Are Insufficient To Fulfill The Government's Compelling Interest In Protecting Minors From Harmful Material

Respondents argue that the enforcement of obscenity laws is a less restrictive way to protect minors from harmful material. Resp. Br. 21-22. But as this Court has repeatedly recognized, the government has a distinct compelling interest in protecting minors from material that is not obscene by adult standards, but is obscene and harmful with respect to minors. *Reno* v. *ACLU*, 521 U.S. at 864-865; *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639. Enforcement of obscenity laws does nothing whatever to advance that distinct compelling interest.

Respondents' reliance on three other congressional enactments is equally misplaced. Resp. Br. 22, 49. As respondents note, the Children's Internet Protection Act (CIPA) mandates the use of filtering software in libraries that receive federal Internet-related assistance. See *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003). An Act of Congress establishes a special kids.us domain that contains sites that are not harmful-to-minors. Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, 116 Stat. 2766. And Congress has required Internet Service Providers to make persons aware of the availability of filtering software. 47 U.S.C. 230(d).

Those measures, however, have only a limited effect. CIPA does not apply to libraries that do not receive Internet-related federal assistance or to the tens of millions of computers in private homes; the kids.us domain offers only a limited number of sites for minors to explore; and providing information about filtering software cannot ensure that the software will be widely used or overcome the limitations of that tool discussed above. Thus, while those three enactments offer some measure of protection to minors, and can work together with COPA to ameliorate the problem of pornography on the Internet, none offers a comprehensive solution to the problem or eliminates the compelling need for COPA's mandatory screening obligation.

CONCLUSION

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
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IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF FOCUS ON THE FAMILY AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE*, SUPPORTING PETITIONER

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34 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTEREST OF *AMICI CURIAE* 1

CONSENT TO FILE BRIEF 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

THE COURT OF APPEALS COMMITTED CLEAR ERROR IN APPLYING STRICT SCRUTINY TO THE CHILD ONLINE PROTECTION ACT 5

A. The "Harmful to Minors" Material Proscribed in COPA is Commercial Child Obscenity. As such, it Deserves, and Therefore Receives, NO Protection under the First Amendment to the United States Constitution 5

B. COPA'S Provisions are Rationally Related to Legitimate Government Interests 25

C. Judged in Relation to the COPA's Plainly Legitimate Sweep, COPA is not Substantially Overbroad 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003)..... 4, 5, 7
ACLU v. Reno, 31 F.Supp. 2d 473 (E.D. Pa. 1999)... 27
Ashcroft v. A.C.L.U., 535 U.S. 564 (2002)..... 7,26,27
Boston Beer Co. v. Massachusetts, 97 U.S. 25(1878)..10
Broadrick v. Oklahoma, 413 U.S. 601 (1973)..... 26
Cohen v. California, 403 U.S. 15 (1971) 17
Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) 13
FCC v Pacifica Foundation, 438 U.S. 726 (1978)..14,17
Ginsberg v. State of New York, 390 U.S. 629 (1968) 7,9,14-16,18,19,24,25,27
Miller v. California, 413 U.S. 15 (1972)..... 7, 12-14,18,19,23-25,27
New York v. Ferber, 458 U.S. 747 (1982)..... 14,22,23,26,28,29
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)..... 7,8,11,19,25,28,29
Poe v. Ullman, 367 U.S. 497 (1961) 9
Pope v Illinois, 481 U.S. 497 (1987)..... 19,24, 27
Reno v ACLU, 521 U.S. 844 (1997).....15, 26
Roth v. United States, 354 U.S. 476 (1957).....7,11,23
Schenck v. U.S., 249 U.S.47 (1919)..... 11
Smith v. United States, 431 U.S. 291 (1977)..18,19,24,27

Constitution and statutes:

U.S. Const: Amend. I 7

Child Online Protection Act of 1998 (COPA), 47 U.S.C. § 231 ..... 3, 5-7,18

Miscellaneous:

MODEL PENAL CODE §207.10 (2) (Tentative Draft No. 6, 1957) 12

Committee Report on COPA, H.R. Rep. No. 105-775 (1998).....19-21, 27

Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 9 (1998) [Hearings] 9, 21

S. Rep. No. 106-141 (1999) 21

Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L.R. 391, (1963)..... 10

INTEREST OF AMICI CURIAE

This *amicus curiae* brief is filed on behalf of Focus on the Family and the Family Research Council.[1]

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological, and spiritual health of children and their families in the United States and throughout the world.

Focus on the Family's Founder and Chairman, Dr. James Dobson, a distinguished child psychologist, served as a Commissioner on the Attorney General's Commission on Pornography in 1985-86 and is the author of scores of books, pamphlets, and papers on child development, education, marriage, and society.

Focus on the Family and Dr. Dobson have produced two major videos, "A Winnable War" and "Fatal Addiction: Ted Bundy's Final Interview", which directly discuss the harms of pornography to children, men, women, and families in America, as well as Dr. Dobson's interview with Ted Bundy and his book *Pornography: Addictive, Progressive and Deadly*. Tom Minnery of Focus was compiler and editor of the book *Pornography: A Human Tragedy*, chronicling analyses and commentary on the testimony and findings of the Attorney General's Commission on Pornography. In addition, Focus continues to produce resource materials on these issues, such as "An Overview of Online Pornography:

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[1] In accordance with Rule 37(6), *amici* certify that this brief was authored entirely by Counsel of Record for *amici* and that no part of the brief was authored by any attorney for a party. The Alliance Defense Fund provided a monetary contribution to the preparation or submission of this brief; no other person or entity other than *amici curiae* or their counsel provided a monetary contribution to the preparation or submission of this brief.

The Problems, a Legal Review, and Activist Organizations", "The Power of the Picture", "When Sex Becomes An Addiction", "An Affair of the Mind", and "Toxic Porn." Worldwide, countless concerned citizens, public officials, professionals, and parents have seen and read these videos and books. Millions of people hear Focus on the Family's daily radio broadcasts dealing with family concerns and interests on over 2,000 outlets in North America. Its monthly magazine has a circulation of nearly two million. Focus on the Family regularly communicates and counsels with victims and families who have children devastated by pornography, molestation, and abuse. See: www.family.org.

Family Research Council is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance, and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families.

In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC works to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications, and films on the impact of pornography have been distributed to over 400,000 scholars, students, organizations, and citizens. FRC's legal and public policy experts are continually sought out by members of Congress and State legislators for assistance and advice on the unique relationship between parents and their children.

FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts, including those involving the regulation and harmful effects

of pornography, obscenity, and child pornography. FRC publishes and disseminates resource materials, legal memoranda, and public policy studies on pro-family issues. These publications include discussions on the problems and legal controversies surrounding pornography. See: www.frc.org.

Focus on the Family and Family Research Council work to preserve and protect the family and have particular knowledge about the social and legal impact of pornography that will be helpful to the Court in this case.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record, consented to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

To protect our nation's children, and to preserve a decent society, Congress may, consistent with the First Amendment, restrict commercialized child obscenity on the Internet that is "harmful to minors." Congress may do so, regardless of whether such material is deemed obscene to adults. In this regard, *amici* contend that the "harmful to minors" material restricted by the Child Online Protection Act, 47 U.S.C. § 231 (1998), is a category of material ***wholly outside*** the protection of the First Amendment.

Thus, the Court of Appeals committed clear error in applying strict scrutiny to COPA. The court below erroneously assumed that COPA's provisions constituted

content-based regulation of expression protected by the First Amendment. *ACLU v. Ashcroft,* 322 F.3d 240, 247, 251 (3rd Cir. 2003). Acting on this incorrect assumption, the Court of Appeals treated COPA's provisions as presumptively invalid and erroneously subjected the statute to strict scrutiny. *Id.*

Before deciding the constitutionality of COPA, *amici* request this Court to determine whether the commercialized "child obscenity", restricted as "harmful to minors" by COPA, deserves protection under the First Amendment. Good and serious reasons exist for this Court to hold that such material is unprotected by the First Amendment. These reasons include:

> 1) The Government has an interest in maintaining a decent society through restrictions on commercialized obscenity;
> 2) The Government has an interest in protecting our children from exploitation and exposure to commercialized obscene materials;
> 3) The commercialized child obscenity, restricted as "harmful to minors" in COPA, is in fact, dangerously harmful to our children and their future;
> 4) Permitting a commercial onslaught of child obscenity to our children lacks any value worthy of protection; and
> 5) Recognizing and classifying commercial child obscenity, as a category of material unprotected by the First Amendment is consistent with this Court's prior decisions.

COPA is rationally related to the government's interest in protecting our nation's children from

commercialized child obscenity, and in preserving a national right to a decent society.

Amici, therefore, urge this Court to reverse the Court of Appeals and uphold the constitutionality of the COPA as passed by Congress.

ARGUMENT

THE COURT OF APPEALS COMMITTED CLEAR ERROR IN APPLYING STRICT SCRUTINY TO THE CHILD ONLINE PROTECTION ACT

The Court of Appeals erroneously assumed that COPA's provisions constituted content-based regulation of expression protected by the First Amendment. *ACLU v. Ashcroft,* 322 F.3d 240, 247, 251 (3rd Cir. 2003) Acting on this incorrect assumption, the Court of Appeals treated COPA's provisions as presumptively invalid and erroneously subjected the statute to strict scrutiny. *Id.* Because COPA's provisions do not restrict *protected* speech under the First Amendment, this Court should hold COPA's provisions constitutional if its provisions are rationally related to a legitimate government interest. (See discussion *infra* in subsection A and subsection B of this brief).

A. THE "HARMFUL TO MINORS" MATERIAL PROSCRIBED IN COPA IS COMMERCIAL CHILD OBSCENITY. AS SUCH, IT DESERVES, AND THEREFORE RECEIVES, NO PROTECTION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

As passed by Congress, COPA provides that:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign

> commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both. 47 U.S.C. § 231(a).

Within the statute, Congress precisely defined "material that is harmful to minors" --

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. 47 U.S.C. § 231(e)(6).

Before deciding whether COPA is constitutional, this Court should first inquire whether the material restricted by the statute is unprotected by the First Amendment.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. Historically, this Court has never included within the protection of the First Amendment, material of the kind proscribed by COPA. *See, e.g., Roth v. United States,* 354 U.S. 476, 482-485 (1957); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 23 (1972); *Ginsberg v. State of New York*, 390 U.S. 629, 635 (1968); *see also, Ashcroft v. A.C.L.U.*, 535 U.S. 564, 574 (2002).

Amici request this Court to recognize that the "harmful to minors" material restricted by COPA is a category of material ***wholly outside*** the protection of the First Amendment. No party contests this point with regard to COPA's restriction on traditional adult obscenity, as stated in the first part of the definition providing that material is "harmful to minors" if it is "obscene." *See ACLU v. Ashcroft,* 322 F.3d at 246 n.6.

As in cases involving adult obscenity and child pornography, *amici* believe that Congress is also entitled to restrict commercialized child obscenity on the Internet that is "harmful to minors." *Amici* request this Court to recognize that the commercial child obscenity, restricted by COPA as "harmful to minors," *also* falls outside the protection of the First Amendment. *Amici* provide the following reasons in support:

Reason I – *The Government has an interest in maintaining a decent society through restrictions on commercialized obscenity.*

In *Paris Adult Theater I*, (hereinafter *Paris*) this Court affirmed the existence of a legitimate government

interest in maintaining a decent society by restricting commercialized obscenity:

> The States have a long-recognized legitimate interest in permitting regulation of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. In an unbroken series of cases extending over a long stretch of this Court's history it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications. (internal quotes and citations omitted) *Paris*, 413 U.S. at 57.

In particular, Chief Justice Burger, for the Court in *Paris*, held that a legitimate state interest exists in restricting commercialized obscenity -- even where effective safeguards "against exposure to juveniles and to passersby" exist. *Id.* This Court expressly recognized that the American public has a right to maintain a decent society:

> These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself... It concerns the tone of the society, the mode, ... the style and quality of life, now and in the future *** there is a right of the Nation and of the States to maintain a decent society. (quotation marks and citation omitted) *Id.* at 58-59.

It is certainly clear that Congress, in working toward passage of COPA, believed in a right of our nation to maintain societal decency. For example, at a hearing on legislative proposals, one member of Congress cited to a recent national poll finding that "the number one concern on

the minds of voters is the moral decline of our society." *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 9 (1998)* [hereinafter, Hearings], (statement of the Rep. Oxley). Congressman Oxley's statement cautioned that:

> If we as a nation hope to address the coarsening of our culture and the loss of values among our young people, we have to begin by addressing the most serious threat, and do so by protecting kids from the degrading content readily available on the Internet. *Id.*

In *Ginsberg*, this Court upheld the constitutionality of the state criminal child obscenity statute upon which Congress patterned COPA. *Ginsberg* itself noted that the state court of last resort, in upholding the legislature's power to employ variable concepts of obscenity, relied on "its power to protect the health, safety, welfare and morals of its community..." *Ginsberg*, 390 U.S. at 636. Thus, if the physical and psychological states of our children are of obvious importance, the moral condition of our nation's youth is at least as compelling. As Justice Harlan stated in his opinion in *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961):

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of

> subjects with which every society in civilized times has found it necessary to deal . . .

The broader issue in the instant case is whether the Constitution permits a state to regulate on the basis of morality. The more specific (and perhaps easier) question is whether a state may constitutionally regulate commercial child obscenity on the basis of morality.

Consideration of the Court's obscenity jurisprudence, on its own terms, reveals that the prevailing test for obscenity is rooted in the state's interest in preserving morality and decency. A careful analysis reveals that, "[o]bscenity laws. . .are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality'." Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L.R. 391, (1963).

One must analyze obscenity law within the larger context of morals legislation in general. A state (or the federal government) certainly has the power to prohibit certain conduct solely because it contravenes the collective moral code of the community. The power of the government to regulate for the advancement and preservation of morals and decency is a time-honored principle of law:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however different it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to. . .the preservation of good order and the public morals." *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1878).

This power of the government to regulate for purposes of morality and decency is reflected in laws prohibiting prostitution, incest, adultery, and polygamy, to name a few. These offenses include "victimless" crimes, in which the only discernible evil is that of immorality. An analysis of the test for restricting adult obscenity reveals that such is an appropriate power of government.

When the Supreme Court first had occasion to deal with the issue of obscenity in *Roth*, 354 U.S. 476, it *did not* adopt the clear and present danger test, which had its origin in *Schenck v. United States*, 249 U.S. 47 (1919). The clear and present danger test is a device used by the courts to connect speech with conduct the government may regulate (i.e., non-speech evil). If, for instance, speech causes a breach of the peace, the government may certainly punish the person who directly brought about the substantive evil that the government has a right to prevent. If the rationale for proscribing obscenity were simply that it caused rapes or sexual assaults, there would have been no need to create an entire new category of unprotected speech. But, if the rationale for obscenity laws was to maintain standards of morality and decency and to preserve the moral tone of the community (*see, e.g., Paris*, 413 U.S. at 57-59), another method of analysis was needed. The Court adopted this new approach by creating the *Roth* test: "Whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." 354 U.S. at 489

In elaborating on what obscenity meant, from a constitutional perspective, the Court stated that "a thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion, . . ." *Roth* 354 U.S. at 487-88 n. 20

quoting MODEL PENAL CODE §207.10 (2) (Tentative Draft No. 6, 1957).

The clarifying quotation from the Model Penal Code focuses on an unhealthy lustful, shameful, or morbid interest in nudity, sex, or excretion. This clearly and unequivocally posits morality and decency as the justification for prohibiting obscenity, even as to adults. These bases for creating a new category of unprotected speech become even more compelling when applied to children.

In its revised obscenity test from *Miller*, this Court retained the "prurient interest" test, and also asked whether the work depicts or describes, *in a patently offensive way*, sexual conduct specifically defined by the applicable state law. 413 U.S. at 27. The thrust of the obscenity test is clearly not that any evil conduct must accompany the speech. The use of "prurient interest" as the touchstone for obscenity, as well as the focus on "patently offensive" in the *Miller* test, are clear indicators that obscene speech comprises a category of unprotected activity precisely because it offends contemporary standards of morality and decency.

Another aspect of *Miller* points in the direction of the concept of obscenity having a close relationship to decency. In describing what a state could clearly prohibit as obscene under *Miller*, the Court lists, "[p]atently offensive representations or descriptions of . . . excretory functions..." 413 U.S. at 25. The evil a state addresses with such a statute is an offense to a person's sensibilities caused by an explicit description of excretory functions. This kind of statute is not directed to speech causing any sort of anti-social sexual behavior; rather its focus is on maintaining an acceptable level of decency and preventing injury to an adult's moral sensibilities. That such is an acceptable reason for a state to

regulate speech is even more remarkable because the usual rule is that a government cannot regulate speech simply because it offends someone. *See, e.g., Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (striking down a local ordinance which made it a crime to display any material that causes racial or religious hatred). Obscenity regulation is permissible because the speech effects are a special kind of offense to the morality and decency of the community. Morality and decency, then, are placed on a higher level than psychic or emotional sensibilities.

Prior to enunciating the test for obscenity in *Miller*, this Court discussed the rationale for certain categories of speech being unprotected by the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Miller*, 413 U.S. at 20-21 (internal quotation marks and citations omitted).

The last word in this excerpt is especially instructive. Morality is the prevailing value when balanced against speech that is not an essential part of any exposition of ideas. This is precisely the balance struck by Congress when it promulgated COPA. Commercial child obscenity is balanced against society's interest in protecting and preserving the moral values of our nation's children.

Commercial child obscenity, as carefully defined by COPA in conformance with the *Miller* standards, is clearly not a category of speech that is an essential part of any exposition of ideas. When placed up against society's interest in protecting our children and preserving societal decency, no question exists about which value is more important.

Reason II *-- The Government has an interest in protecting our children from exploitation and exposure to commercialized obscene materials.*

In *New York v. Ferber*, 458 U.S. 747, 765-66 (1982), this Court concluded that non-obscene child pornography fell into a category of material not entitled to protection under the First Amendment. In reaching its conclusion, this Court reaffirmed that:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. *Ferber*, 458 U.S. at 756-57 (1982) (Internal quotation marks and citations omitted).

Thus, it is clear that "[t]he well-being of its children is . . . a subject within the State's constitutional power to regulate..." *Ginsberg*, 390 U.S. at 639; *see also*, *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government's interest in the well-being of its youth justified

special treatment of non-obscene indecent broadcasting received by adults and children); and *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (addressing Congress's earlier attempt to restrict sexually explicit material on the Internet, this Court acknowledged that the Government has an interest in protecting children from harmful materials -- and noted the Act's legitimate purposes.)

Similar to COPA, the statute upheld in *Ginsberg* made it a crime "knowingly to sell *** to a minor under 17 ... any picture *** which depicts nudity *** and which is harmful to minors," ... and "any *** magazine *** which contains *** (such pictures) *** and which, taken as a whole, is harmful to minors." *Ginsberg*, 390 U.S. at 633.

The obscene materials commercially sold to a child in *Ginsberg* were

> 'harmful to minors' in that they had, within the meaning of [the statute] that quality of *** representation *** of nudity *** (which) *** (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors. *Ginsberg*, 390 U.S. at 632-33.

Even though the material at issue in *Ginsberg* was "not obscene for adults," this Court recognized the statute's restrictions as "obscenity of material sold to minors under 17." *Ginsberg*, 390 U.S. at 634-35. In upholding the statute, this Court acknowledged that it, like COPA, was "a variable from the formulation for determining obscenity [used by the Court for adults]." *Ginsberg*, 390 U.S. at 635.

This Court discussed the efficacy of adopting a concept of "variable obscenity" as a tool to determine whether material obscene to children falls into a category of speech unprotected by the First Amendment:

> *Variable obscenity* . . . furnished a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance." *Ginsberg*, 390 U.S. at 634, n.4 (emphasis added; internal quotation marks and citations omitted).

COPA does precisely what this Court alluded to in *Ginsberg*. Its legislative history and its carefully crafted language deal only with material intended for an audience of sexually mature adults, and that is by statutory definition unprotected as to minors. COPA also focuses on the primary (child) audience and the peripheral (adult) audience, and draws a constitutionally appropriate distinction between the two classes.

Perhaps the most important factor in analyzing the appropriateness of the concept of variable obscenity is that of the "varying circumstances" surrounding the dissemination of speech. The most salient circumstance is the method of communication -- the Web. This medium is intrinsically different from books, movies, magazines, records, TV, radio, or any other medium of communication with which this Court has dealt in the past. The paradigm has changed. An almost universally available medium of communication for

the dissemination of commercial child obscenity changes the constitutional calculus in profound ways.

The Court has always analyzed speech cases transactionally. That is, it looks at who the speaker is, who the audience is, and what the method of communication is. As each of these variables changes, the analysis may change. For instance, in *FCC v. Pacifica Foundation*, the Court upheld a restriction on the broadcast of a sexually and excretorily explicit monologue by George Carlin. 438 U.S. 726 (1978). The monologue was broadcast on the radio, during daytime hours, and heard by a child. *Id.* at 729-730. These factors led the Court to uphold a time restriction on the broadcast, observing that there were other ways for consumers to receive the information. *Id.* at 749-50.

However, in *Cohen v. California*, 403 U.S. 15, 91 (1971), the Court reversed a conviction for breach of the peace occasioned by a person having a vulgar message on a jacket inside a courthouse. The main factor that distinguished *Pacifica* from *Cohen* was the medium of communication. In *Pacifica*, the transmission over the airwaves was found to be very intrusive into the right of a parent to control what his child heard, because it was an auricular assault, and the burden was on the disseminator to change the time of his speech. 438 U.S. at 748-50. In *Cohen*, on the other hand, a visual assault in a courthouse was not pervasive enough to punish the gesture, and Justice Harlan, for the Court, suggested that the solution to the problem was simply for the viewer to look away. *Cohen*, 403 U.S. at 21-22.

Transmission by the Internet is the most intrusive, pervasive medium of communication ever created. In the otherwise privacy and safety of home, the Internet's omnipresent accessibility to our children makes it an

especially dangerous method of transmitting commercial child obscenity.

Like COPA in the instant case, the statute in *Ginsberg* simply adjusted "the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors." *Ginsberg*, 390 U.S. at 638 (internal quote and citations omitted). Here, as in *Ginsberg*, the government was justified in restricting "the availability of sexual material to minors since it was rational for the legislature to find that the minors' exposure to such material might be harmful." *Ginsberg*, 390 U.S. at 639. In this regard, *Ginsberg* recognized that:

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. *Id.*

When Congress enacted COPA it, like the legislature that promulgated the statute in *Ginsberg*, "expressly recognized the parental role in assessing sex-related material harmful to minors" according to an adult community standard with regard to what is suitable to minors. *Ginsberg*, 390 U.S. at 639; *see also* 47 U.S.C. § 231 (e)(6)(1998); *Miller*, 413 U.S. at 24-25 (1973), *Smith v. United States*, 431

U.S. 291, 300-02, 309 (1977), and *Pope v Illinois*, 481 U.S. 497, 500-01 (1987). Moreover, nothing in COPA restricts "the discretion of the parent to purchase material for their children who are under the age of 17." *See*, H.R Rep. No. 105-775, at 15 (1998).

Ginsberg further recognized an independent interest of the government in protecting the "welfare of children" and ensuring they are "safeguarded from abuses which might prevent their growth into free and independent well-developed ... citizens." *Ginsberg*, 390 U.S. at 640-41 (internal quotation marks and citation omitted). In *Miller*, this Court stated, "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19. *Miller* then upheld the constitutionality of a criminal obscenity statute and articulated the test for obscenity adopted by Congress in COPA. 413 U.S. at 24-25 (1973), as modified by *Smith*, 431 U.S. at 300-02, 309 (1977), and *Pope*, 481 U.S. at 500-01 (1987). Finally, in *Paris* this Court, as in previous decisions, again "pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults," *Paris*, 413 U.S. at 57 citing *inter alia*, *Miller*, 413 U.S. at 18-20.

Reason III – *The Commercialized Child Obscenity, Restricted as "Harmful to Minors" in COPA is, in Fact, Dangerously Harmful to our Children and Their Future.*

Evidence in the record links the material proscribed in COPA to criminal and other dangerously unhealthy conduct. For example, in its report accompanying COPA, Congress documented how the material restricted by COPA

harms children. H.R. Rep. No. 105-775, at 11 (1998). Specifically, the report indicated that:

> A child's sexual development occurs gradually throughout childhood. Exposure to pornography shapes children's sexual perspectives by providing them with information on sexual activity intended for adults. The type of information provided by pornography, however, does not provide children with a normal sexual perspective. Unlike learning provided in an educational or home setting, exposure to pornography is counterproductive to the goal of healthy and appropriate sexual development in children. . . . *Id.* (citing Brooks, Assistant Chief of Psychology Services, Department of Veterans Affairs, The Centerfold Syndrome (1996)).

The report also summarized testimony before Congress highlighting the dangers of exposing children to material restricted by the statute:

> Pornography produces "permission-giving beliefs" for sexual pathology and sexual violence and that pornography produces distortions that change an individual's belief system. As a result, children exposed to pornography can become victims or victimizers, encouraged by the strong sexual images contained in pornography found on the World Wide Web. H.R. Rep. No. 105-775, at 11 (1998), citing testimony of Dr. Mary Anne Layden.

Indeed, in a congressional hearing, Congress received compelling evidence of horrendous problems that occur in adults, from their exposure as children to material proscribed by COPA. The problems include unhealthy, harmful sexual addiction, suicide, rape, and other crimes of violence. *See*

Hearings, 105th Cong. 55-57, 84 (1998)(statement of Dr. Mary Anne Layden). For example, Dr. Layden testified that for the past 13 years she had specialized in the treatment of sexual violence victims and perpetrators. In all those 13 years she had not treated one case of sexual violence that did not include material proscribed by COPA as a substantial factor. See Hearings, 105th Cong. 56 (1998) (statement of Dr. Mary Anne Layden).

Moreover, according to the Federal Bureau of Investigation, the Internet and other on-line services have become "one of the most prevalent techniques by which pedophiles and other sexual predators" identify and recruit "children for sexually explicit relationships." Hearings, 105th Cong. 26 (1998) (Statement of Stephen R. Wiley, Chief, Violent Crimes and Major Offenders Sections, Federal Bureau of Investigation).

The congressional report accompanying COPA also noted "the body of research indicating that pornography has significant impact on attitudes and values, and that such impact is clearly harmful to minors." H.R. Rep. No. 105-775, at 11 (1998) citing testimony from the organization Enough is Enough.

When Congress passed the Child Internet Protection Act (CIPA), another statute designed to protect the well-being of children on the Internet, it documented additional evidence of the danger facing our children. S. Rep. No. 106-141, at 1 (1999). The Senate Report documented the increased access to the Internet by schools and libraries receiving federal assistance, and then reported that:

> Though the Internet represents tremendous potential in bringing previously unimaginable education in information opportunities to our nation's children,

there are very real risks associated with the use of the Internet. Pornography, including obscene material, child pornography, and indecent material is available on the Internet. This material may be accessed directly and intentionally, or may turn up as the unintended product of a general Internet search . . . the aggressive tactics of commercial pornographers on the Internet expose children to random, and unintended exposure to sexually explicit material. *Id.* at 2.

The Senate Report next documented how the exposure to pornography harms children and their development. *Id.* at 3. The Report continued by documenting

> the increasing incidents of pedophiles utilizing the Internet to lure and seduce children into illegal and abusive sexual activity. In many cases, such activity is the product of individuals, taking advantage of the anonymity provided by the Internet to stalk children . . . [A]n increasingly disturbing trend is that of highly organized, and technologically sophisticated groups of pedophiles who utilize advanced technology to . . . sexually exploit and abuse children. *Id.* at 3-4.

It is clear in the instant matter that the danger to our children is real. When the constitutionality of a statute like COPA is at issue, this Court traditionally has accepted legislative findings in connection with the potential danger and harm to children. *Ferber*, 458 U.S. at 757-58

Reason IV *– Permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy lustful, shameful, morbid interest in sex – and lacking serious literary, artistic, political, or scientific value), lacks constitutional value.*

Like adult obscenity and child pornography statutes, *amici* acknowledge that commercial child obscenity restrictions "run the risk of suppressing protected expression." *See Ferber*, 458 U.S. at 756. *Amici* submit, however, that material of the kind described in COPA lacks constitutional value, due to its extreme detachment from the fundamental principles protected by the First Amendment.

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. Again, commercial child obscenity, as carefully defined by COPA in conformance with the *Miller* standards, is clearly not a category of speech that is an essential part of any exposition of ideas. The value of permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy, shameful, morbid interest in sex – and lacking serious literary, artistic, political, or scientific value) is, therefore, "exceedingly modest, if not *de minimis*;" *See Ferber*, 458 U.S. at 763, *Miller*, 413 U.S. at 34-35.

Free speech ranks among the most cherished of our fundamental freedoms. *Amici* suggest that it is exceedingly doubtful, however, that the framers of our Constitution intended to protect pedophiles and commercial peddlers of pornography who provide access to patently offensive hard-core sexually explicit material to our children. "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans

the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S. at 34.

"Harmful" sexually explicit material for adults, ought not be constitutionally protected when someone, for commercial purposes, makes it available to children – whether at the newsstand, the World Wide Web, or anywhere else. This is especially true when the commercial peddler of porn intrudes via the Internet into the sanctity of one's home to sell their wares. Too much is at stake, whether in terms of our nation's right to societal decency, or the well-being of our children.

***Reason V** -- Recognizing and classifying commercial child obscenity, as a category of material unprotected by the First Amendment, is consistent with this Court's prior decisions.*

In the instant case, Congress deliberately drafted the "harmful to minors" definition in COPA consistent with this Court's jurisprudence in the area of child obscenity.

Congress patterned COPA after the child obscenity requirement upheld in *Ginsberg*, drawing on the three-part test for obscenity for minors modified in *Miller*, 413 U.S. at 24-25, *Smith*, 431 U.S. at 300-02, 309 (holding that an "average person, applying contemporary community standards" also serves as the standard in the second prong, determining the patent offensiveness of the material) and *Pope v Illinois*, 481 U.S. at 500-01 (holding that in prong three, "a reasonable person" standard is applied to the serious value determination). Thus, when Congress defined "material that is harmful to minors" in COPA, it created a *Millerized-Ginsberg* definition for what is obscene for minors. It is important to note that this Court has directed its

holdings, "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct" that may be properly regulated. *See*, *Paris*, 413 U.S. at 69.

A careful reading of COPA's provisions, in the light of these cases, brightly illuminates congressional understanding of this Court's constitutional jurisprudence when it promulgated COPA. Thus, classifying commercial child obscenity, as a category of material unprotected by the First Amendment, is consistent with this Court's prior decisions.

B. COPA'S PROVISIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS

The commercial child obscenity, proscribed in COPA as "harmful to minors" is, for the five reasons discussed in the previous section, a category of speech ***wholly outside*** the protection of the First Amendment. To protect our nation's children, and to preserve a decent society, Congress may, consistent with the First Amendment, therefore, restrict commercialized child obscenity on the World Wide Web. Moreover, this is true even if, in the extremely unlikely event, such material is not also obscene to adults. Restricting commercial peddlers of child obscenity from selling their material to our children on the Web is rationally related to the government's national interest in maintaining a decent society. It is also rationally related to the government's interest in protecting the well-being of our children. COPA is, therefore, constitutional. *See, e.g., Ginsberg*, 390 U.S. at 641-43; *Miller*, 413 U.S. at 18-19; *Paris*, 413 U.S. at 57.

C. JUDGED IN RELATION TO THE STATUTE'S PLAINLY LEGITIMATE SWEEP, THE CHILD ONLINE PROTECTION ACT IS NOT SUBSTANTIALLY OVERBROAD

"[T]he wide-reaching effects of a court striking down a statute on its face, at the request of one whose own conduct may be punished despite the First Amendment," are undisputed. *Ferber*, 458 U.S. at 769 quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court, therefore, recognizes "that the overbreadth doctrine is 'strong medicine'" and employs it 'with hesitation, and then only as a last resort.'" *Id.* Indeed, "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767. Given that this traditional rule is grounded in Article III of the United States Constitution (limiting the jurisdiction of federal courts to *actual* cases and controversies), any exception – like the overbreadth doctrine – "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, 458 U.S. at 768-69. Thus, to succeed in a facial challenge to a statute like COPA "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; *Ashcroft v. ACLU*, 535 U.S. at 584

This Court struck down Congress's first attempt to protect the nation's children from exposure to indecent sexually explicit material on the Internet. *Reno v ACLU*, 521 U.S. 844 (1997) (holding the Communications Decency Act of 1996 (CDA) unconstitutional.) As recognized in *Ashcroft*, Congress, in drafting COPA, responded to the overbreadth

objections to the CDA relied upon by the Court in the *Reno* decision:

> First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communication made "for commercial purposes." And third, while the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors" *Ashcroft v. ACLU*, 535 U.S. at 569-70; *see also* H.R. Rep. No. 105-775, at 16 (1998).

Thus, it is clear that Congress intended to limit the scope of COPA to address an expressly narrow part of the child obscenity problem. As discussed previously, Congress patterned the definition of "harmful to minors" in COPA after the child obscenity requirement upheld in *Ginsberg*, drawing on the three-part test for obscenity for minors modified in *Miller*, 413 U.S. at 24-25, *Smith*, 431 U.S. at 300-02, 309, and *Pope*, 481 U.S. at 500-01. The plain language used in COPA, as construed in this Court's obscenity jurisprudence, cannot, by definition, censor or inhibit *protected* speech of any kind. This is especially true in light of COPA's affirmative defenses, which further narrow the scope of COPA's coverage. Thus, Congress made clear it did not intend the provisions of COPA to apply to serious treatment of sexual issues. In any case, the materials Respondents allege are at risk are not at risk. Indeed, the District Court opinion in this case reveals that the trial court found none of the material at issue even potentially "harmful to minors." *ACLU v. Reno*, 31 F.Supp. 2d 473, 480, 484-86 (E.D. Pa. 1999). COPA's provisions virtually eliminate any possibility of selective prosecutorial

enforcement, especially when read in the bright light of this Court's obscenity jurisprudence. Judged in relation to the COPA's plainly legitimate sweep, any overbreadth here is illusory, and, in context, certainly not substantial.

"When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *Ferber,* 458 U.S. at 769 n. 24.

CONCLUSION

Amici ask that this Court not take away the right of the American adult community to preserve societal decency and to protect its children. Who we are morally, as individuals and as a nation, is a fabric made up of much more than express opinions. Here it is important to note again that, in the decisions relied upon by *amici*, this Court has directed its holdings, "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct" that may be properly regulated. See, *Paris*, 413 U.S. at 69.

Your *amici* suggest that permitting a commercial onslaught of patently offensive sexual material to children (designed to appeal to a child's unhealthy, shameful, morbid interest in sex) will physically desensitize our children to that higher sentiment of individual and collective decency. Collectively, if this Court sanctions such a commercial offensive against our nation's children in the name of free speech, expect the remnants of what is left of our national moral fabric to unravel.

Undeniably, we stand at a constitutional construction site. Those who came before us built a constitutional democratic republic upon fundamental foundations of decency. It is now our watch. It is well for us to recall, therefore, the ancient truth that "righteousness exalts a nation." *Proverbs* 14:34 (NIV).

If, in the name of free expression, we guarantee the right of individuals to engage in obscene harmful conduct to our children, we merely create an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes the fundamental foundations of our country. In the end, the structural institutions of free government may stand for a time; the very essence for which they stand, however, ceases to exist.

Here the "evil to be restricted" "overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber*, 458 U.S. at 763-64. The class of material defined in COPA "bears so heavily and pervasively on the welfare of children" and on a national right to decency in society, that its commercialization on the Internet overwhelmingly tips the balance of any competing interests. *Ferber*, 458 U.S. at 763-64; *Paris*, 413 U.S. at 57-61. Moreover, the method of transmission into the privacy and safety of our home, is the most intrusive, pervasive medium of communication ever created. Indeed, the Internet's ubiquitous accessibility to our children makes it a particularly dangerous method of transmitting commercial child obscenity. *Amici* contend, therefore, that it is permissible to consider these materials wholly undeserving of the protections afforded by the First Amendment.

COPA's provisions are rationally related to the governmental interests of protecting our nation's children, and preserving a decent society. Congress may, therefore,

consistent with the First Amendment, restrict commercialized child obscenity on the Internet that is "harmful to minors." *Amici* here provide this Court with good, serious reasons to reach such a holding. For these reasons, *amici* urge this Court to reverse the Court of Appeals and uphold the constitutionality of COPA as passed by Congress.[2]

Respectfully submitted,

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[2] *Amici*, in the alternative, suggest that COPA is narrowly tailored to compelling governmental interests, and would therefore, on that alternative basis, also urge reversal.

(6)

No. 03-218

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In The
Supreme Court of the United States

JOHN ASHCROFT,
Attorney General of the United States,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* DUPAGE COUNTY, ILLINOIS IN SUPPORT OF PETITIONER

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29 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE DANGERS FACING OUR NATION'S CHILDREN FROM COMMERCIAL PEDDLERS OF PORNOGRAPHIC MATERIALS JUSTIFY THIS COURT'S ENFORCEMENT OF THE CHILD ONLINE PROTECTION ACT	5
II. CONGRESS MAY RESTRICT COMMERCIAL SPEECH ON THE INTERNET TO PROTECT THE HEALTH OF CHILDREN	14
A. The Health Of Children Constitutes A "Substantial Interest" Which Clearly Justifies Congress' Right To Regulate The Peddling of Sexually Explicit Materials On The Internet	14
B. The First Amendment Is Not Absolute And Thus The Peddling Of Sexually Explicit Materials On The Internet Is Not Immune From Regulation	18
C. Congress' Restrictions On The Peddling Of Sexually Explicit Materials Pass Constitutional Muster Because They Have A Reasonable Relation To The Goal Of Protecting Children's Health	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES:

Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996) 14, 15, 17

Beauharmais v. Illinois, 343 U.S. 250 (1952) 21

Board of Trustees, State University of New York v. Fox, 492 U.S. 469 (1989) 4, 22, 23, 24

Buckley v. Valeo, 424 U.S. 1 (1976) 20

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) 22

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 18, 19, 21

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 14

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 14

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 21

Ginsburg v. New York, 390 U.S. 629 (1968) 14

National Socialist Party of America v. Skokie, 432 U.S. 43 (1977) 20

New York v. Ferber, 458 U.S. 747 (1982) 15, 18, 19

Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al., 528 U.S. 377 (2000) 20

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 21

Osbourne v. Ohio, 495 U.S. 103 (1990) 15, 16

Prince v. Massachusetts, 321 U.S. 158 (1944) 2, 15

Roth v. United States, 354 U.S. 476 (1957) 19

TABLE OF AUTHORITIES – Continued

Page

Stanley v. Georgia, 394 U.S. 557 (1969) 14

Stromberg v. California, 283 U.S. 359 (1931) 20

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 20

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 18

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 19

CONSTITUTIONS:

U.S. Const. amend. I 23

STATUTES:

47 U.S.C. § 231(a)(1) 3, 24

47 U.S.C. § 231(c)(1) 3, 24

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois.

With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year.

The parents, teachers, school officials and prosecutors of DuPage County, Illinois have a substantial interest in the issue of whether federal, state and local governments may restrict the time, place and manner that vendors of sexually explicit materials may peddle their products. Thus, the rights of federal, state and local units of government to take reasonable and necessary measures to ensure the health and safety and welfare of society's children is of profound concern to the *Amicus Curiae*.

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amicus Curiae* filing this brief. The consent letters have been submitted with this brief.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Children are the foundation of this nation. They are our future and our destiny. In order to preserve our own futures and the future of our nation, and the countless communities scattered across the United States, a commitment to the health and well being of our nation's children is necessary to achieve these goals. We are, as a community of people, duty bound to take certain measures to protect the minds as well as the bodies of children from harm. The psychological health and well being of our nation's children are among the nation's greatest treasures. These treasures will serve as the genesis for the development of future technology. From these treasures new medicines will be discovered, new art will be composed, new inventions will be created, and new generations will form.

Children are dependant upon society's adults to protect them from harm. They alone are incapable of making decisions regarding their own health and safety. A child's psyche is fragile, and requires protection, nurturing and care.

The relief sought by Respondents, if granted by this Court, will undermine federal, state and local governments across this nation in their efforts to take reasonable and necessary measures to protect the health, safety and welfare of children. The relief sought by Respondents in

this case, if granted by this Court, may deprive society of a major tool by which it can directly address concrete risks of harm to the minds and bodies of society's children.

The Child Online Protection Act (COPA) makes it unlawful for any person to make any communication for commercial purposes by means of the Internet and that is available to minors that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. § 1(a)(1) and (c)(1) (Supp. IV 1998). COPA's scope is limited to commercial communications. COPA imposes restrictions only in limited and narrow areas where a business entity's commercial speech could impact and could affect children.

Said another way, COPA commands vendors of sexually explicit materials to install safety measures and to provide guarantees that children may not access web sites containing sexually explicit materials. COPA mandates that commercial businesses bear the responsibility to ensure that their products do not end up in the hands of minors to whom their products could not otherwise be legally sold.

COPA does not interfere with an adult's ability to purchase materials with mature themes and adult content if they so choose. COPA does not restrict the peddling of sexually explicit materials in lawful transactions to adults. To the contrary, COPA solely requires vendors of sexually explicit materials to take reasonable steps to ensure that their sexually explicit materials are not improperly

disseminated to an audience that the law does not permit these vendors to approach. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*[2], and therefore should be held to meet constitutional protections otherwise afforded to commercial speech.

The Respondents seek the benefit of unfettered discretion to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, Respondents' rights to seek and attain corporate profits from the sales of sexually explicit materials will supercede the rights of parents, teachers, principals, school boards, prosecutors and others acting in *parens patrie*, to create safe harbors where children are safe from the devastating effects of sexually explicit materials.

The Respondents further seek to attain First Amendment protections for sexually explicit advertising not previously afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from federal, state or local state regulation sought by Respondents is unprecedented.

The *Amicus Curiae* respectfully asks this Court to rule that commercial speech can be restricted where the interest of children are at stake and that the rights of commercial Internet vendors peddling sexually explicit materials is not absolute under the First Amendment of our nation's Constitution.

---

[2] *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989).

ARGUMENT

I. THE DANGERS FACING OUR NATION'S CHILDREN FROM COMMERCIAL PEDDLERS OF PORNOGRAPHIC MATERIALS JUSTIFY THIS COURT'S ENFORCEMENT OF THE CHILD ONLINE PROTECTION ACT.

Limiting a child's access to pornographic materials is an issue of paramount importance to this country. Internet pornography presents a terrible dilemma for parents, teachers, librarians and others acting in a *parens patrie* capacity who are responsible for other people's children, when children are online.

The impact the Internet has made and will make on children in the United States is immeasurable. Most children do not know what life was like in this country without personal computers and the Internet. According to a year 2000 survey by the United States Census Bureau, nearly 60 percent of school-age children have access to the Internet at home and at school.

It is a reality in today's society that many parents' technological sophistication does not measure up to that of their children when it comes to computer and Internet use. Parents' and guardians' lack of computer skills and Internet savvy places them at a significant disadvantage when attempting to protect their children from dangers posed by Internet access. Because the Internet fails to distinguish between adults and children, parents and guardians are faced with a daily struggle to protect their children from inappropriate materials on this global, interactive, and anonymous medium. Because the Internet has a high profile in society and because of the ease at which it can be accessed, parents and guardians are faced with a real and

major challenge to protect their children in this environment.

It is obvious that no one single approach will suffice to protect children from pornography. The efforts and influence of many parties will be required to control where children go, what they see, to whom they talk, and what they do when online. This multi-level effort already has taken root across the nation in the numerous social and educational strategies that have been implemented to date that work to teach children about online dangers.

In addition to educational initiatives implemented by parents, guardians, schools and libraries, technology and public policy have important roles to play as well. Technology-based tools, such as filters and firewalls, provide added options to protect children and in certain circumstances have proven to be effective. However, these technologies are inherently imperfect because they may permit inappropriate materials to still be accessed. Despite parents' and legal guardians' best efforts to prevent children from accessing such materials, many pornographic sights are often given common or innocuous names and are often accessed unintentionally.[3] Parents' and guardians' efforts to filter out or to otherwise limit access to such sites must still be performed on a "one at a time" basis still will likely fail to filter or limit access to adult content web sites entirely.

[3] For example, the website www.whitehouse.com does not provide a link to the home of the President of the United States, but actually links the computer user to a web site that provides adult content materials.

These problems posed a child's access to adult content web sites on the Internet have been widely documented. A number of efforts have been undertaken to address this issue. Many pieces of legislation in addition to COPA have been proposed by various people and organizations. One example is the Protecting Children from Peer to Peer Pornography Act ("P4 Act"). The P4 Act, proposed by Congressman Joseph Pitts, is an effort to arm parents with the tools they need to protect their children from pornography and threats to privacy posed by peer-to-peer file trading networks. In support of this proposed legislation, Congressman Pitts was quoted in an on line press release as stating:

> Millions of people are using peer-to-peer software at any given time. About forty percent of them are children. . . . Unfortunately, pedophiles and pornographers use these networks to distribute pornography . . . a child . . . can type in an innocent key word and inadvertently download pornography.

In the year 2000, Florida lawmakers also took aim at the issue of pornography and computers by creating a legal foundation for mandatory third-party reporting of child pornography stored on computers and by targeting sexual predators' use of the Internet to expose themselves to minors. One proposed bill, HB 895, required any person who "knows, or has reasonable cause to believe, that a computer contains images of child pornography" to make a report to law enforcement officials. The bill provided civil immunity from making such reports and created a second-degree misdemeanor penalty for failing to make a report. The second proposed bill, HB 683, focused on making activities electronic exhibitionists. The bill targeted any

person who intentionally committed various sexual acts or simulated any act involving sexual activity "live over a computer online service, Internet service or local bulletin board service and who knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age."

Law enforcement officials and prosecutors across the nation, such as those employed by the *Amicus Curiae*, are engaged in daily efforts to combat the health and safety threat to children created by access to pornographic web sites. This effort has required and will in the future require the dedication of substantial governmental resources. According to the San Diego, CA District Attorney's office[4]:

(1) Internet crime is the fastest growing crime in the U.S., and children are the fastest growing victim pool.

(2) In the U.S., 95% of schools are now connected to the Internet.

(3) Over 45 million children ages 10 through 17 use the Internet. Among them:

(a) One in five has been sexually solicited.

(b) One in four has encountered unwanted pornography.

[4] http://www.co.san-diego.ca.us.

(4) Close to 60% of teens have received an e-mail or instant message from a stranger and half have communicated back.

(5) Over 75% of Internet crimes involving sexual solicitations of children and exposure to unwanted pornography is not reported to police or parents.

Many parents do not supervise their children's Internet use. Some startling statistics provided by the San Diego County District Attorney's Office[5] report on the status of parental involvement in today's society:

(1) An estimated 20% of parents do not supervise their children's Internet use at all.

(2) Only 52% of parents moderately supervise their children's Internet use.

(3) Some 71% of parents stop supervising Internet use by their children after the age of 14, yet 72% of all Internet-related missing children cases involve children who are 15 years of age or older.

(4) Close to 62% of teens say their parents know little or nothing about the web sites they visit.

Simply put, parents can not assume full responsibility for monitoring their children's on-line activities, especially when a substantial amount of the time children spend on line is when they are at school, at libraries, or at their friends' homes. Parents cannot simply be everywhere at all times. The responsibility, at least a portion thereof, to protect children in this context must lie with the commercial vendors or pornographic materials.

[5] http://www.co.san-diego.ca.us.

The concern over children accessing pornographic materials is not limited to parents and prosecutors in DuPage and San Diego counties. This issue is of a national concern and has resonated with our nation's leaders. On October 25, 2003, President George W. Bush raised further awareness of the need to protect children from pornography, both in printed and electronic forms by proclaiming that October 26, 2003 through November 1, 2003 to be National "Protection From Pornography Week".

In this proclamation, President Bush underscored the substantial pain, suffering and damage pornography can cause to families, children and communities. President Bush described federal initiatives to combat the dangers facing children from pornography. These initiatives include the allocation of substantial federal resources to the Department of Justice to intensify investigative and prosecutorial efforts to combat obscenity, child pornography, and child sexual exploitation on the Internet. This case is evidence of the ongoing efforts by the President and the Department of Justice in this regard.

This proclamation by President George W. Bush states:

> Pornography can have debilitating effects on communities, marriages, families, and children. During Protection From Pornography Week, we commit to take steps to confront the dangers of pornography.
>
> The effects of pornography are particularly pernicious with respect to children. The recent enactment of the PROTECT Act of 2003 strengthens child pornography laws, establishes the Federal Government's role in the AMBER Alert System, increases punishment for Federal

crimes against children, and authorizes judges to require extended supervision of sex offenders who are released from prison.

We have committed significant resources to the Department of Justice to intensify investigative and prosecutorial efforts to combat obscenity, child pornography, and child sexual exploitation on the Internet. We are vigorously prosecuting and severely punishing those who would harm our children. Last July, the Department of Homeland Security launched Operation Predator, an initiative to help identify child predators, rescue children depicted in child pornography, and prosecute those responsible for making and distributing child pornography.

Last year, I signed legislation creating the Dot Kids domain, a child-friendly zone on the Internet. The sites on this domain are monitored for content and safety, offering parents assurances that their children are learning in a healthy environment. Working together with law enforcement officials, parents, and other caregivers, we are making progress in protecting our children from pornography.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim October 26 through November 1, 2003, as Protection From Pornography Week. I call upon public officials, law enforcement officers, parents, and all the people of the United States to observe this week with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of October, in the year of our Lord two thousand three, and of the Independence of the United States of America the two hundred and twenty-eighth.

GEORGE W. BUSH

COPA is a vehicle that will ensure that commercial sellers of pornographic materials will take action to ensure that pornographic materials distributed in the course of their businesses will be restricted from the view of minors. COPA further ensures that sites containing adult content will be separated from sites that are appropriate for viewing by our nation's youth.

Parents, guardians, schools, libraries and government are all working to protect children from dangers on the Internet created by commercial pornographers. The commercial pornography industry has an equal, if not greater, responsibility to account for the whereabouts of its products and wares. COPA shifts the responsibility for protecting minors from pornography to an appropriate place – to businesses that generate *financial profits* from the sale and distribution of pornographic materials.

This Court should not afford business entities a license to ignore overwhelming data that minors are frequently and regularly gaining unfettered access to their pornographic materials. The Constitution should not be applied in a manner to sanction the pornographic industry's unwillingness to take responsibility to protect children in this nation from viewing pornographic materials. The pornographic industry can and should be required to implement technology that is currently technologically and

economically feasible that can prevent minors from accessing pornographic materials. In the event that taking such measures causes an increase in these commercial entities' operating costs, those costs should be dealt with in the same manner that any other business entity deals with overhead or compliance costs related to the business venture. Because all commercial vendors of pornographic materials would be required to comply with COPA's requirements, no one vendor would be afforded a competitive advantage over another.

The potential dangers to our nation's children are far too great to be afforded a second place priority to the purported "commercial speech" interests of commercial pornographers. The mental and physical health of our nation's children should remain first and foremost under the law and in our society. The nation's prosecutors must be afforded proper tools to protect children's health and safety, and COPA provides these prosecutors with the appropriate tools. To rule in favor of Respondents in this case, respectfully, threatens to jeopardize local prosecutors' efforts to protect the children in their communities from the unrestricted distribution of pornographic materials on the Internet. Accordingly, the *Amicus Curiae* respectfully requests that this Court enter an order in favor of Petitioner.

II. CONGRESS MAY RESTRICT COMMERCIAL SPEECH ON THE INTERNET TO PROTECT THE HEALTH AND SAFETY OF OUR NATION'S CHILDREN.

A. The Health Of Children Constitutes a "Substantial Interest" Which Clearly Justifies Congress' Right To Commercial Speech On The Internet.

This Court has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The law is well settled that a legislature can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik*, 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long been a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York*, 390 U.S. 629 (1968), this Court sustained a law which protected children from non-obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia*, 394 U.S. 557, 566 (1969), this Court has allowed

stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

More recently, this Court reiterated the position it has taken in prior cases permitting the balance of First Amendment rights to be tipped in favor of the health of children. In *Osbourne v. Ohio*, 495 U.S. 103 (1990), this Court stated:

> It is evident beyond the need for elaboration that [the government's] interest in safeguarding the physical and psychological well-being of a minor is compelling. . . .

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. This threat has been well documented. Mr. J. Robert Flores, Vice President for the National Law Center for Children and Families, stated to Congress' Committee on Commerce (Subcommittee on Telecommunications, Trade and Consumer Protection) at a hearing on Obscene Material Available on the Internet, that sexually explicit

materials pose a real and significant threat to our nation's youth:

> Does this threaten children? You better believe it does. Our kids and grand-kids see it and become indoctrinated by it.

Statement of J. Robert Flores, Esq., Vice President and Senior Counsel, National Law Center for Children and Families before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, Hearing on: Obscene Material Available Via The Internet (May 23, 2000). Mr. Flores elaborated on the increased effort that vendors use to market sexually explicit materials over the Internet:

> The pornography industry has also become among the most aggressive marketers on the Internet, using newly developed "push" technologies . . . [T]hus, even if it were true, and I doubt it, that only those who sought out obscenity could find it, today only a lucky few are able to avoid it, as the Internet user community is bombarded with advertisements, tricked into visiting sites, given hot links to porn when search engines are asked for innocent sites, sent unsolicited porn spam e-mails, and trapped in endless mousetraps that bounce them from porn site to porn site when they try to leave.

Id. Our nation's children are not immune from the situation described by Mr. Flores in his statement. The Thursday, October 7, 1999 edition of *The Florida Times Union* reported that 91 percent of teenagers responding to a

survey responded that they have stumbled across an Internet web site that their parents would find objectionable.[6]

A March 28, 2000 survey commissioned by the National School Boards Association (NSBA) and supported by the Children's Television Workshop and Microsoft, reported one of parents' top concerns about their children using the Internet was the possibility that their children will encounter pornography. According to this survey, 78 percent of children ages 13 to 17 said they use the Internet when they are alone.

There is a real threat to our nation's children posed by the inordinate amount of information, and sexually explicit materials, available to anyone with a computer and a connection to the Internet. The vast majority of children clearly are using the Internet alone, and virtually all of these children have been exposed to objectionable material during their travels down this "information superhighway." Children lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

Congress enacted COPA as a response to the need to protect the nation's children from the dangers they may encounter on the Internet. The serious impact of sexually explicit material on our nation's children clearly supported COPA's enactment. The impact that sexually explicit

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[6] This survey, published by the Safe America Foundation and Yankelovich Partners, Inc., surveyed 502 parents and 503 teens on Internet issues in August 1999.

materials have on children in this nation clearly supports a balancing of First Amendment rights by this Court to affirm COPA's validity and enforceability.

B. The First Amendment Is Not Absolute And Thus The Peddling of Sexually Explicit Materials On The Internet Is Not Immune From Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded some level of protection under the First Amendment from unwarranted governmental interference. Respondents' arguments in essence are an attempt to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that the communication of all sexually explicit materials on the Internet will be virtually immune from any and all regulation. Said another way, Respondents' arguments, if successful, will elevate the peddling of sexually explicit materials on the Internet to a degree that it is afforded the same constitutional protections that are traditionally afforded to political speech. The Respondents' positions are contrary to the letter and spirit of prior decisions made by this Court and should be flatly rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike the peddling of sexually explicit materials on the Internet, profit is not the central motive. In fact, in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) this Court laid the foundation for the exclusion of sexually explicit materials from the realm of constitutionally protected expression. *See generally*, *New York v. Ferber*, 458 U.S. 747 (1982). There, this Court clearly established that the act of

peddling sexually explicit materials is not afforded absolute protection under the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted). Consistent with its decision in *Chaplinsky*, this Court squarely held in *Roth v. United States*, 354 U.S. 476 (1957) that "obscenity is not within the area of constitutionally protected speech. . . ." In *Chaplinsky*, this Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment:

> The original States provided for the prosecution of libel, blasphemy, and profanity, and the universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956.

New York v. Ferber, 458 U.S. 754 (footnotes omitted).

There are many examples where this Court has held numerous types of non-commercial speech are afforded First Amendment protections. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia*

Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change.

However, this Court has also ruled that even true political speech is not immune from governmental restriction. This Court has refused to extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has regularly restricted other forms of speech where profit was not the

central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra,* 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like the commercial peddling of sexually explicit materials on the Internet, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

In this case, the Respondents seek a judicial license to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, Respondents' rights to seek and attain corporate profits from the sale of sexually explicit materials will supercede the rights of parents, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of sexually explicit materials.

C. Congress' Restrictions On The Peddling Of Sexually Explicit Materials Pass Constitutional Muster Because They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a legislature has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the legislature is not required to employ the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, the legislature has established that the health and safety of children are substantial interests that supercede any First Amendment protection that Internet advertisers may have otherwise had in the absence of these substantial interests.

The legislature is not required to seek out and use the least restrictive means available to protect children from the negative effects of exposure to sexually explicit materials. Respondents have suggested that the legislature is required, or should be required, to apply the least restrictive means test when restricting commercial speech. The *Amicus Curiae* acknowledges that this Court, in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in all commercial speech cases. *Fox, supra*.

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than has been previously afforded by this Court. *Id.* Justice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decision-makers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.*, 455 U.S. 191 (1982).

The legislature is not required to use the absolute least restrictive means that guarantees in each and every

circumstance that children, and children only, will be insulated from the adverse effects of sexually explicit materials. The legislature is required only to demonstrate that its restrictions on the peddling of sexually explicit materials on the Internet is *reasonably related* to the goal of protecting children's health and that its restrictions are narrowly tailored to achieve that purpose.

The regulations at issue here clearly satisfy this Court's test. The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. § 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes restrictions only in those limited areas where the commercial speech affects children. These regulations do not restrict or in any way bar the peddling of sexually explicit materials through lawful transactions to adults. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*, and therefore should be upheld by this Court.

CONCLUSION

The *Amicus Curiae* County of DuPage, Illinois respectfully requests that this Court rule in favor of Petitioner John Ashcroft, Attorney General of the United States.

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03-218

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC., IN SUPPORT OF PETITIONER

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24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT COPA IS NOT NARROWLY TAILORED 4

a. MATERIAL HARMFUL TO MINORS 4

b. CONSIDERED AS A WHOLE 5

c. PRURIENT INTEREST, PATENT OFFENSIVENESS AND SERIOUS VALUE 9

II. THE TERMS 'COMMERCIAL PURPOSES' AND 'REGULAR COURSE OF BUSINESS' IN COPA ARE NOT OVERBROAD 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)..... 18

ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003)..... 4,8, 11, 15

ACLU v. Reno (Reno III), 217 F.3d 162 (3d Cir. 2000)..... 4

Ashcroft v. ACLU, 535 U.S. 564 (2002) 5

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)..... 8

Blake v. Wilson, 268 Pa. 469, 112 A. 126 (Pa. Sup. Ct. 1920)..... 14

Callihan v. Montgomery, 272 Pa. 56, 115 A. 889
(Pa. Sup. Ct. 1922) 15, 18

Cochrane v. William Penn Hotel, 140 Pa. Super. 323,
13 A.2d 875 (Pa. Super. Ct. 1940) 15

Eckstein v. Cullen, 803 F. Supp. 1107 (E.D. Va. 1992)..... 13, 18

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 13, 18

Ginsberg v. New York, 390 U.S. 629 (1968)..... 3, 9, 10, 17

Goocher v. State, 633 S.W. 2d 860 (Tex. Crim. App. 1982)..... 7

Gooden v. Mitchell, 41 Del. 301, 21 A.2d 197
(Del. Sup. Ct. 1941)..... 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 13

Guillara v. Liquor Control Commission, 121 Conn. 441,
185 A. 398 (Conn. Sup. Ct. 1936)..... 15

Jenkins v. Georgia, 418 U.S. 153 (1974) 5

Kois v. Wisconsin, 408 U.S. 229 (1972)..... 3, 7, 8, 9

M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983) 16

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 17

Miller v. California, 413 U.S. 15 (1973)..... 9, 13, 17

Palmer v. Hoffman, 318 U.S. 109 (1943)..... 12

Passarelli v. Monacelli, 121 Pa. Super. 32, 183 A. 65
(Pa. Super. Ct. 1935)..... 14

Rees v. State, 909 S.W.2d 264 (Tex Ct. App. 1995)..... 5, 7

Roth v. United States, 354 U.S. 476 (1957)..... 17

Scanlon v. Hartman, 282 Ore. 505, 579 P.2d 851
(Ore. Sup. Ct. 1978)..... 15

Sgattone v. Mulholland & Gerwals, 290 Pa. 341, 138 A. 855
(Pa. Sup. Ct. 1927) 14

Smith v. California, 361 U.S. 147 (1959)..... 18

United States v Gross, 313 F.Supp. 1330 (S.D. Ind. 1970)..... 13

United States v. Merrill, 746 F.2d 458 (9th. Cir. 1984) 7

United States v. Skinner, 25 F.3d 1314 (6th Cir. 1994)..... 13

Upper Midwest Booksellers Assoc. v. Minneapolis,
780 F.2d 1389 (8th Cir. 1985) 16

Vernon Beigay v. Traxler, 790 F.2d 1088 (4th Cir. 1986)..... 13

Vescio v. Pennsylvania Elec. Co., 336 Pa. 502, 9 A.2d 546
(Pa. Sup. Ct. 1939) 15

STATUTES

CHILD ONLINE PROTECTION ACT (COPA) 47 U.S.C. §231 ... *passim*

SECTION 484-h, NEW YORK PENAL CODE 10

18 U.S.C.S. 1466 ..... 12, 13

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1451 (4th ed. 1968) 14

BLACK'S LAW DICTIONARY 356 (7th ed. 1999) 14

FREDERIC C. SCHAUER, THE LAW OF OBSCENITY, 108-109, (BUREAU OF NATIONAL AFFAIRS, INC., 1976) 6

NEW WEBSTER'S DICTIONARY AND THESAURUS OF THE ENGLISH LANGUAGE 132 (1992) 14

INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc., as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it specializes in providing assistance on issues related to the laws of obscenity, child pornography, broadcast indecency,

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[1] This *Amicus Curiae* brief was authored in whole by Counsel of Record Paul J. McGeady and Of Counsel Mary McNeill of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

and the display and dissemination of materials that are harmful to minors. Morality in Media filed a joint brief with the American Catholic Lawyers Association in the Third Circuit below as *amici curiae* in support of the government's position, and in *Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564 (2002).

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002).

Amicus files this brief in support of the Petitioner because it believes our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Amicus contends that the Third Circuit's holdings on remand that the Child Online Protection Act ("COPA") is not narrowly tailored because: - (1) it is not limited geographically; (2) the terms "harmful to minors" and "minors" are vague and overbroad; (3) COPA requires that pictures and images be considered in isolation and; (4) the terms "commercial purposes," and "engaged in the business" are overbroad – all fail in light of the definitions in the statute and well-established law.

The first objection, to the effect that COPA is not limited geographically, has been disposed of by the opinion of this Honorable Court when it remanded the matter to the Third Circuit.

The contention that COPA's language relating to the term "harmful to minors" is unconstitutionally vague, overbroad and not narrowly tailored is answered by the fact that comparable language was upheld by this Honorable Court in *Ginsberg v. New York*.

The third contention that images and pictures must, under the statute, be considered in isolation is met by the "taken as a whole" language of the statute, and the requirement in *Kois v. Wisconsin* that matter "rationally related" also be considered in determining what is meant by "taken as a whole."

Amicus shows finally, that the statute's language on the word "minor" and the phrases "commercial purposes" and "regular course of business" is neither vague nor overbroad.

Amicus also notes that COPA is a type of an obscenity statute where strict scrutiny is not required.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT COPA IS NOT NARROWLY TAILORED.

The Third Circuit on remand held that COPA is not "narrowly tailored" in its use of the phrases, "material that is harmful to minors," "taken as a whole," "prurient interest," and "lacks serious literary, artistic, political, or scientific value for minors."[2]

(a) Material Harmful to Minors

One of the court's narrowly tailored objections relating to "Material Harmful to Minors" reads as follows:

> When contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings. *See Reno III*, 271 F. 3d at 173-80.[3]

[2] Child Online Protection Act (COPA) 47 U.S.C. §231(e)(6).
[3] *ACLU v. Ashcroft*, 322 F.3d 240 at 252, 3rd Cir (2003).

Amicus contends that the court's language admits of no interpretation other than that the court still believes that "community," as used in COPA, requires restriction of community standards to a precise geographical area. The Supreme Court has rejected this contention in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), quoting *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

(b) Considered as a Whole

The Third Circuit makes much of the contention that COPA's "taken as a whole" provision, in effect, requires consideration of images in isolation rather than in context. This appears to be a non sequitur. There is nothing in the statute that says that each image is the "whole." Supreme Court jurisprudence requires the consideration of context in order to determine the "whole", whether it be a motion picture, video, book, play, picture, broadcast, or internet transmission. Obviously, a well-instructed jury will take context into consideration in determining the whole provided that there is a thematic connection between the picture, image, file, article, recording or other matter of any kind and the other depictions or descriptions that comprise the context.

Rees v. State,[4] is a case in point (that specifically considers the "taken as a whole" concept as applied to television programming) that can properly be applied to the Internet. Here, the Court of Appeals of Texas (3rd Dist., Austin) held that: a sexually explicit film titled, "Midnight Snack", which was shown on a Cable TV program called "Infosex", could be separately considered apart from the entire program and determined to be obscene.

[4] 909 S.W.2d 264 (1995) *cert. denied* 519 U.S. 863 (1996)

The court quotes a work of author Frederic C. Schauer titled "The Law of Obscenity" for the meaning of "taken as a whole" as employing a "thematic unit" concept. In Schauer's work, we find the following:

> It has... been suggested that, in general, the entire 'physical item' that is, book, magazine or other item, be looked at as a unit. If the 'physical item' test were rigidly applied, however, it would be far too easy to include hard-core pornography as one article in a magazine that also contained excerpts from the writing of D.H. Lawrence or James Joyce. It would be more appropriate for the court, and the trier of the fact, to make an evaluation in every instance as to the intended or likely 'unit of perception'. A magazine article, or a single book, or a motion picture, are intended to be seen or read as a unit, and should therefore be evaluated as such. So also when articles or stories are clearly interrelated and it is intended and expected that they will be perceived as a unit. But magazine 'articles' with no connection except that of dealing with the same general subject matter are not necessarily likely to be seen or read together, and should therefore be evaluated separately.[5]

[5] Frederic C. Schauer, The Law of Obscenity, 108-109 (Bureau of National Affairs, Inc., 1976)

The *Rees* case also interprets *Kois v. Wisconsin*, [6] and says that it indicates:

> That the work to be taken as a whole should be measured in thematic units and not in physical units... The court did not decide whether the pictures alone were obscene or whether the newspaper in its entirety must be considered because the article and the pictures were rationally related.

This court also refers us to *Goocher v. State*,[7] where Judge Clinton used the term "Unit of Perception," applying a "thematic unit" concept and to *United States v. Merrill*,[8] where the Ninth Circuit held that a constitutionally protected letter enclosing two obscene playing cards was not thematically connected.

Since COPA did not define each species of material as a whole, *Kois v. Wisconsin* and related cases require that items be thematically connected to be considered together as a whole. While it is true that *Kois* uses the phrase "in the context", it goes on to say of the pictures:

> In the context in which they appeared in the newspaper, they were rationally related to the theme of the article.

It can be seen that the word "context" does not exist in a vacuum. In other words, a jury could not be instructed to

[6] 408 U.S. 229 (1972).
[7] 633 S.W. 2d 860, (Tex. Crim. App. 1982), appeal dismissed, 459 U.S. 807 (1982).
[8] 746 F.2d 458, (9th Cir. 1984)

look at the allegedly obscene items "in context" without a further instruction "to determine if the allegedly obscene depiction or description were rationally related" to the theme of a protected depiction or description. The governing rule in *Kois* in determining context is "thematic relationship." Since this is so, it is not necessary to consider the alleged obscene or alleged harmful to minors item in the "context", of "a whole Web page," an "entire multipage Web site" or an "interlocking set of Web sites,"[9] unless the allegedly offending item is rationally related to the theme of said Web page or multipage Web site, etc. It seems improbable that there would be a rational relationship to a theme of the *internet* or *interlocking Web sites*. In fact, it is doubtful that even an entire Web site, that is otherwise protected, would be thematically rationally so related. We are probably looking at a possible thematic rational relationship to a Web page or pages. [10]

In all events the *Kois* rule is applicable and provides the narrow tailoring if such be necessary.

The Third Circuit quoting *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 248 (2002) states:

> Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.

[9] *ACLU v. Ashcroft, supra* at 252 (3rd Cir): "As Justice Kennedy observed in his concurring opinion in *Ashcroft*, the application of the constitutional taken 'as a whole' requirement is complicated in the Internet context: 'It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites.'"

[10] In this respect, a*micus* differs from the suggestion of Petitioner in this case that "individual pictures or articles on a Web site should generally be examined in the context of the entire Web site." (Reply Brief for Petitioner in its Petition for Certiorari in this matter at page 3).

If the court had continued to quote from *Free Speech Coalition*, it would find that immediately after the word "offensive" in the above-referenced quote, this Honorable Court said, "see *Kois v. Wisconsin,* 408 U.S. 229, 231 (1972)", indicating that we should look to the *Kois* concept of a rationally related theme.

We submit that the *Kois* rule would apply to determine the whole and that the statute is narrowly tailored by such application without the necessity of defining "taken as a whole". It is noted that *Miller v. California*[11] did not define "taken as a whole," although it used the phrase twice.

(c) Prurient Interest, Patent Offensiveness and Serious Value

The statute defines the term "minor" as any person less than 17 years of age. The Third Circuit found this constitutionally infirm as including all minors without a distinction as to age and finds the statute, for this reason, unconstitutional in the application of the Prurient Interest, Patently Offensive and Serious Value prongs in COPA.

The difficulty with the Third Circuit opinion in this regard is the fact that the United States Supreme Court in *Ginsberg v. New York*[12] has already ruled on the validity of New York's Harmful to Minor's Statute, which makes no distinction as to the age of minors except that a minor is a

[11] 413 U.S. 15 (1973)

[12] 390 U.S. 629 (1968).

person under the age of 17 years. This ruling, of this Honorable Court, indicates that COPA, which covers all minors under 17, is also constitutional in this respect.

The *Ginsberg* Court upheld a definition remarkably similar to the "Harmful to Minors" language at issue here. The Court referred to all such as "children" and indicated that material that can be held obscene for children may not be obscene for adults. There was no separation of older or younger minors. *Amicus* submits that under the *Ginsberg* rationale, no separation is necessary. The fact that those of age 17 and older are treated under the statute as adults is sufficient to protect the free speech rights of older minors. Those 16 and under are treated by the *Ginsberg* Court and by Congress in this statute as children deserving special protection. Congress in its wisdom and not the court is the logical body to draw the line.

A significant quote from *Ginsberg* [13] reads:

> To sustain state power to exclude material defined as obscenity by Section 484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute *is* "harmful to minors" ...We do not demand of legislatures 'scientifically certain criteria of legislation.' (Emphasis added).

Amicus submits that it is not irrational to define minors as under age 17 or to determine that exposure to materials defined in the statute as "harmful to minors" is harmful and is a species of unprotected obscenity.

[13] Id. At 641-642.

II. THE TERMS 'COMMERCIAL PURPOSES' AND 'REGULAR COURSE OF BUSINESS' IN COPA ARE NOT OVERBROAD.

Amicus submits that the Third Circuit erred in holding that the "Commercial Purposes" section of COPA is not narrowly tailored because it "imposes content restrictions on a substantial number of 'commercial,' non-obscene speakers" and exposes "too wide a range of Web publishers to potential liability."[14]

Specifically, *Amicus* contends that the court erred by holding that the term regular course of business, which is part of the definition of "Commercial Purposes,"[15] "does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content..."[16]

To add such "amount" or "proportion" language to the statute as a way to narrow the definition of "regular course of business" would be to provide pornographers with a loophole to exploit in order to disseminate their material.

To follow the Third Circuit's logic would mean that a Web site that devotes the vast majority of its content for example to video games, which tends to attract children, should be permitted to disseminate harmful to minors'

[14] *ACLU v. Ashcroft*, 3rd Cir., *supra*, at 256-257.
[15] Child Online Protection Act, H.R. 3783 § 231 (e) (2) (A) Commercial Purposes - A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." and (B) "'engaged in the business' means that the person ...devotes time, attention, or labor to such activities, as a regular course of such person's trade or business..."
[16] *ACLU v. Ashcroft*, *supra*, at 257.

material provided it's only a fraction of the Web site's content.

In fact, a similar tactic is used by adult bookstores in some municipalities which have zoning laws that define an adult bookstore as one that displays a certain percentage or proportion of adult material. To circumvent the law, some adult bookstores stock up on non-pornographic material when in fact its main business consists of the sale of pornographic material.

If "amount" or "proportion" language is included in COPA, a similar situation would result – pornographers would simply circumvent the law and "stock up" on material deemed not harmful to minors in order to publish harmful to minors' material.

Furthermore, in *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943), this Honorable Court defined the term "regular course of business," without finding it necessary to impose an "amount" or "proportion" in the definition. The *Palmer* Court held that: "'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

This seems to indicate that the term's definition must be determined on a case-by-case basis, factoring in the nature of the individual business and its methods of conducting itself as a business.

In 18 U.S.C.S. §1466 the term "engaged in the business" is also used and defined. Section 1466 – which

includes a definition of "engaged in the business" that is virtually identical with COPA's – has been upheld.[17]

In *U.S. v. Skinner*, the 6th Circuit upheld §1466's term "engaged in the business" and stated, "(T)he phrases 'engaged in the business' and 'regular course of trade or business' are subject to common sense definitions and are not vague."[18]

The *Skinner* court also quoted *United States v. Gross*, 313 F.Supp. 1330, at 1333 (1970), *aff'd*, 451 F.2d 1355 (7th Cir. 1971) with the following:

> (T)here should be no doubt in the minds of men of common intelligence that..."business" is that which occupies time, attention and labor of men for the purposes of livelihood or profit.

Amicus would like to point out that COPA includes the words "time, attention, or labor" to define "engaged in the business."

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[17] *U.S. v. Skinner*, 25 F.3d 1314, (6th Cir. 1994), and *Eckstein v. Cullen*, 803 F. Supp. 1107, (E.D. Va. 1992). The *Eckstein* court adjudicated the definition of obscenity, not the term "regular course of business," however, it did uphold Section 1466, which includes the term "regular course of business." The court at 1112 states: "(I)t is clear that plaintiff's vagueness challenge to the federal obscenity statute must fail. Section 1466, which prohibits the selling of obscene matter, incorporates the *Miller* definition of obscenity. As such, the statute defines obscenity clearly enough to afford plaintiff, a 'person of ordinary intelligence', a 'reasonable opportunity to know' which sexually explicit magazines she is prohibited from selling in the future. *Grayned v. City of Rockford*, 408 U.S. 104 at 108; see also *Vernon Beigey, Inc. v. Traxler*, 790 F.2d 1088, 1093 (4th Cir. 1986) (regulated materials need not be defined with 'ultimate, god-like precision'); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 at 60 (1989)."

[18] *U.S. v. Skinner*, *supra*, at 1318.

One such common sense definition can be found in Webster's Dictionary,[19] which has as its first definition of the word business, "One's regular employment, profession, occupation." It is clear then that the dictionary definition for the word "business," one that is authoritative for common usage, defines it as activity or work done on a "regular" basis.

Another definition can be found in Black's Law Dictionary, 1451 (4th ed. 1968), which defines "Regular Course of Business" as a term that "(R)efers to habitual or regular occupation that party is engaged in with view of winning livelihood or some gain, excluding incidental or occasional operations arising out of transaction of that business; to normal operations which constitute business."[20]

And in the 1999 edition of Black's Law Dictionary, the term "Course of Business"[21] is defined as "The normal routine in managing a trade or business."

Interestingly, no "amount" or "proportion" language is included in any of these dictionary definitions.

Furthermore, the term "regular course of business," has been well defined by case law,[22] and in none of those

[19] New Webster's Dictionary and Thesaurus of the English Language 132 (1992).

[20] Under this definition, Black's Law Dictionary cited *Sgattone v. Mulholland & Gotwals*, 290 Pa. 341, 138 A. 855 (Pa. Sup. Ct. 1927) and *Passarelli v. Monacelli*, 121 Pa.Super 32, 183 A. 65 (Pa. Super. Ct. 1936). Please not that the *Sgattone* court, at 347, stated: "if the work was in the regular course of his business, by which is meant during the normal operations which constitute it." (Emphasis added)

[21] Black's Law Dictionary 356 (7th ed. 1999). The term "Regular Course of Business" is cross-referenced with the term "Course of Business."

[22] *Blake v. Wilson*, 268 Pa. 469 at 479, 112 A. 126, (1920): "...regular course of business can only refer to the experience and custom in the

cases did the court find it necessary to use "amount" or "proportion" language in its definition.

As the cases[23] define it, the phrase "regular course of business" means "normal operations" or "habitual or regular occupation" or conduct or activity that is engaged in "regularly."

As such case law indicates, the term is *not* used to refer to activity that occurs on an occasional[24], exceptional, variable or incidental basis, but instead connotes *deliberate activity conducted as a normal part of operations* and occurring *on a regular or steady basis.*

Therefore, the Third Circuit's notion[25] that the statute may reach nonprofit organizations and informational Web sites that occasionally or incidentally disseminate such material is stretching the term "regular course of business" beyond its established legal definition.

conduct of the business as is of usual, if not daily, occurrence and observation";
Guillara v. Liquor Control Commission, 121 Conn. 441 at 445, 185 A. 398 (1936): "Another equally recognized meaning of 'regular' is 'steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation.' (Webster's New International Dictionary)"; *Gooden v. Mitchell*, 41 Del. 301, 21 A.2d 197 (1941); *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939); *Scanlon v. Hartman*, 282 Ore. 505, 579 P.2d 851 (1978); *Cochrane v. William Penn Hotel*, 140 Pa. Super. 323, 13 A.2d 875 (1940))

[23] See footnotes 18 and 19.

[24] *Callihan v. Montgomery*, 272 Pa. 56, 115 A. 889 (1922). The court, at 72, stated: "The legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as, now and again..."(Emphasis added)

[25] *ACLU v. Ashcroft, supra*, at 257.

To illustrate what the Third Circuit considers to be COPA's prohibition of protected speech for adults, the court used an example of a medical information Web site that publishes a weekly column on sexual matters, stating that this publisher "might well" be liable under the statute.

The court's reasoning on this issue is faulty precisely because the statute only applies to material that is "designed to appeal" to the "prurient interest"[26] and lacks "serious literary, artistic, political, or scientific value,"[27] albeit with respect to minors, however, adults can still access the material, and should the material be artistic, literary or scientific speech for minors it would not be prohibited by the statute.

The Circuit Court failed to take into account that the statute imposes "restricted access" on minors not on adults. The statute does not ban – or in the words of the Third Circuit "prohibits" – protected expression for adults, it simply aims to screen such material from a minors' access via credit card information or age verification.

Following the Third Circuit's reasoning to its final conclusion, some other harmful to minors' laws would also be unconstitutional due to their restricted access for minors, simply because they impose some slight burden on adult access. For example, the local so-called "brown wrapper"[28] laws, which require opaque covers or blinder racks over pornographic magazine covers.

On this issue, the Circuit Court erred by focusing on sections of the statute without considering the statute as a

[26] COPA, *supra*, § 231 (e) (6) (A).
[27] COPA, *supra*, § 231 (e) (6) (C).
[28] See *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) and *Upper Midwest Booksellers Assoc. v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985)

whole and without taking into account the overall design and purpose of the statute.

Furthermore, the issue of narrow tailoring should not even arise because a harmful to minors' statute should not be adjudicated on a strict scrutiny basis, which is the standard for protected speech. This Honorable Court in *Ginsberg*[29] characterized harmful to minors' material as variable obscenity and said, "Obscenity is not within the area of protected speech or press. *Roth v. United States*, 354 U.S. 476, 485."

The *Ginsberg* Court continued with:

> The three-pronged test of subsection 1 (f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418.

Amicus further contends that the Third Circuit is demanding "god-like precision"[30] in COPA's language such that if the same level of precision were universally applied it would render nearly every statute unconstitutional, since language by its nature has practical limitations.

Also, this Honorable Court has recognized the reality that "any form of a criminal obscenity statute" may have some chilling effect on the sale of First Amendment material, but that, "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an

[29] 390 U.S. 629 at 635 (1968)
[30] *Miller v. California*, *supra* at 28.

antiobscenity law unconstitutional under our precedents." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 49 (1989).

The *Fort Wayne* Court at 49 also stated:

> But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' *Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Cf. also *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).

In conclusion, the term "regular course of business" has been upheld as a definite term capable of common sense interpretation and that it in essence means *deliberate activity* conducted as a *normal part of operations* and *occurring on a regular basis*. None of the cases suggested imposing "amount" or "proportion" language as a way of clarifying the term's meaning.

It has also been held that the term "regular course of business" gives the "person of ordinary intelligence"[31] a "reasonable opportunity to know"[32] the proscribed conduct and the definition is not so vague that the common man would not be able to understand what the term means. Therefore, the contention that a occasional,[33] accidental or incidental publication would fall within the statute's reach defies both the common sense understanding of the phrase

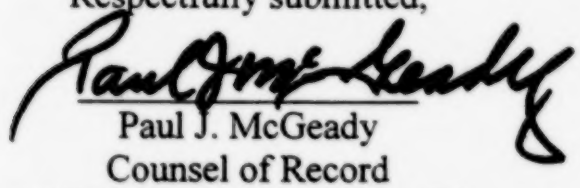
[31] *Eckstein v. Cullen, supra*, at 1112.
[32] *Eckstein, supra.*
[33] *Callihan v. Montgomery, supra.*

"regular course of business" and the body of case law that has defined the term.

CONCLUSION

For all of the aforementioned reasons, *amicus* prays that this Honorable Court reverse the judgment of the court below or in the alternative, remand for additional consideration and study.

Respectfully submitted,



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151

DEC 10 2003

No. 03-218

In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

in support of the *Petitioner*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iii**

INTEREST OF AMICUS CURIAE **1**

SUMMARY OF THE ARGUMENT **1**

ARGUMENT **2**

I. THE THIRD CIRCUIT ERRED IN PRESUMING THAT COPA's "COMMUNITY STANDARDS" PROVISION IS NOT READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION. **2**

II. COPA'S "COMMUNITY STANDARDS" PROVISION IS READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION BECAUSE THE PROPOSED CONSTRUCTION IS REASONABLE, IS BASED ON AN AMBIGUITY IN THE PHRASE, AND DOES NOT REQUIRE THIS COURT TO DRAW ANY LINES THAT CONGRESS HAS LEFT UNDRAWN. **4**

A. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is reasonable. 5

B. Construing "contemporary community standards" to

mean the "contemporary community standards of the community of the creator" is based upon an ambiguity in the phrase. 9

C. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" does not require this Court to draw any lines that Congress left undrawn. 9

III. STATUTORY AND CASE LAW SUPPORT EXISTS FOR CONSTRUING "CONTEMPORARY COMMUNITY STANDARDS" TO MEAN THE "CONTEMPORARY COMMUNITY STANDARDS OF THE COMMUNITY OF THE CREATOR" AND NO GOOD REASON EXISTS TO REJECT THE CONSTRUCTION. 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **page(s)**

ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003) 1-5

ACLU v. Ashcroft, 535 U.S. 564 (2002) 2, 4, 6, 8, 10-11

Davis v. United States, 512 U.S. 452 (1994) 12

Davis-Kidd Booksellers v. McWherter, 866 S.W.2d 520 (Tenn. 1993) 5, 9

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trades Council 485 U.S. 586 (1988) 6-8

Hooper v. California, 155 U.S. 648 (1895) 6, 8, 12

Miller v. California, 413 U.S. 15 (1973) 3, 7, 11

Reno v. ACLU, 217 F.3d 162 (3d Cir. 2000) 2, 3, 7, 10-11

Reno v. ACLU, 521 U.S. 844 (1997) 3, 4, 7, 9, 11

Rhode Island Med. Society v. Whitehouse, 66 F. Supp. 2d. 288 (D.R.I. 1999) 5, 6, 8

Teague v. Lane 489 U.S. 288 (1989) 12

United States v. Cohen,
583 F.2d 1030 (8th Cir. 1978) 11

United States v. Thomas,
74 F.3d 701 (6th Cir. 1996) 11

United States v. Treasury Employees,
513 U.S. 454 (1995) 9

Other Authorities

18 U.S.C. § 3237 (2000) 10

Child Online Protection Act,
47 U.S.C. § 231 (2000) ..... *passim*

Petition for a Writ of Certiorari 3

INTEREST OF AMICUS[1]

WallBuilders, Inc. is dedicated to educating the American public about the proper exercise of rights under the First Amendment. In this capacity, WallBuilders, Inc. is gravely concerned that the unregulated distribution of material that is harmful to minors is not within the proper exercise of First Amendment rights and believes that COPA is a necessary safeguard on the otherwise-pervasive reach of the Internet.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit, in its holding on remand, erred in determining that the Child Online Protection Act, 47 U.S.C. § 231 (2000) (hereinafter "COPA"), will likely be found unconstitutional. *ACLU v. Ashcroft,* 322 F.3d 240, 271 (3d Cir. 2003). The Third Circuit found that application of the "community standards" requirement in effect eviscerates the limitations that Congress crafted in attempting to limit COPA's reach. It does so, according to the Third Circuit, by subjecting an already-broad statute to potential scrutiny in the most conservative community in which a particular Web publication might happen to be accessed. *Id.* The Third Circuit, however, overlooked a narrowing construction to which COPA is readily susceptible. The phrase at issue, "contemporary community standards," can be construed to mean the "contemporary community standards of the community of the *creator* of the material." This construction is allowable under canons of construction articulated by this

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[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

and other courts. When so construed, the Third Circuit's concern that Web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message,'" *Reno v. ACLU*, 217 F.3d 162, 177 (3d Cir. 2000) (citation omitted), vanishes.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN PRESUMING THAT COPA'S "COMMUNITY STANDARDS" PROVISION IS NOT READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION.

In *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), the Third Circuit Court of Appeals upheld the district court's granting of a preliminary injunction against the enforcement of COPA. Crucial to the Third Circuit's holding was its determination that the ACLU would likely prevail on the merits by showing COPA's unconstitutionality. *Id.* at 271. Central to this determination was the Third Circuit's conclusion that variations in community standards to which a Web publisher might be subjected under COPA would "exacerbate[]" COPA's scope and render the statute fatally overbroad. *Id.* at 270-71. For the reasons set forth below, Amicus respectfully believes that the Third Circuit's concern for variations in community standards is unwarranted, and this brief will address this one issue.

Amicus understands that under the questions left open by this Court's ruling in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), and the Third Circuit's analysis of those questions on remand, the resolution of the construction of "contemporary community standards" will not be sufficient by itself to uphold COPA as constitutional. Amicus believes, however, that its suggested narrowing construction of "contemporary community standards" *in conjunction with* the arguments

made by Petitioner regarding COPA's other key terms (including "harmful to minors," "as a whole," "minors," and "commercial purposes") and regarding COPA's affirmative defenses is sufficient to uphold COPA's constitutionality. (Petition for a Writ of Certiorari at 16-22.)

In its first review of COPA, *Reno v. ACLU,* 217 F.3d 162, 178 (3d Cir. 2000), the Third Circuit rejected the government's argument that COPA's phrase "contemporary community standards" could mean an "adult community" rather than a "geographic community" as it did in *Miller v. California*, 413 U.S. 15 (1973). However, in so doing, the Third Circuit presumed that Web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message.'" *Reno*, 217 F.3d at 177 (citing *Reno v. ACLU*, 521 U.S. 844, 877-78 (1997)). The Third Circuit thus presented a false dichotomy. Agreeing with the government's position or deciding that the contemporary community standards had to be those of the community of the recipient are not the only two choices.

Under standard canons of construction for facial overbreadth challenges, there is another narrowing construction that should be adopted and which would save COPA. COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. This construction is particularly important in light of the Third Circuit's concern on remand about the "exacerbating" or compounding effect of "the contemporary community standards" definition and about COPA's other putative problems. *Ashcroft v. ACLU*, 322 F.3d at 270. As will be demonstrated below, the Third Circuit was simply incorrect in its assertion on remand that a narrowing construction is unavailable. *See, id.* at 270-71.

Furthermore, the suggested narrowing construction is

not rendered in any way untenable by anything in this Court's various opinions in *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Even though the Third Circuit erroneously concluded that no narrowing construction was available, it did correctly realized on remand that it had an on-going obligation to seek such a construction. *ACLU v. Ashcroft*, 322 F.3d at 270-71. In other words, no authoritative construction was determined by this Court when the case was first before it. Furthermore, the suggested narrowing construction—at least arguably—meets the concerns raised in each of the opinions issued by members of this Court.

II. COPA'S "COMMUNITY STANDARDS" PROVISION IS READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION BECAUSE THE PROPOSED CONSTRUCTION IS REASONABLE, IS BASED ON AN AMBIGUITY IN THE PHRASE, AND DOES NOT REQUIRE THIS COURT TO DRAW ANY LINES THAT CONGRESS HAS LEFT UNDRAWN.

As the Third Circuit recognized on remand, *id.* at 270, this Court, in *ACLU v. Reno*, 521 U.S. 844, 884 (1997) (herein after "the CDA case"), stated that it could construe a statute narrowly if it were readily susceptible to such a construction. COPA'S "community standards" provision is indeed susceptible to such a construction. This Court indicated that a statute would be readily susceptible to a narrowing construction when "the text or some other source of congressional intent identified a clear line that this Court could draw." *Id.* Other courts have expressed the same position. The Tennessee Supreme Court, for example, has

indicated that textual ambiguity (but not vagueness)[2] can serve as an indication that a text is readily susceptible to a narrowing construction. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993). Likewise, at least one federal court has gone so far as to state that *any* reasonable reading should be accepted to save a statute from a facial overbreadth challenge, even if it is one of several possible conflicting readings. *Rhode Island Med. Society v. Whitehouse*, 66 F. Supp. 2d. 288 (D.R.I. 1999). Under any of these approaches, COPA's "community standards" provision is susceptible to a narrowing construction since the proposed construction is reasonable, is based on an ambiguity in the phrase, and does not require this Court to draw any lines that Congress has left undrawn.

A. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is reasonable.

COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. There is no reason why the language must be construed to mean the community of the recipient rather than the community of the creator. If the creator is subject only to the standards of his or her own community, the Third Circuit's concern vanishes, as do those of expressed by various members of this Court when this case was first before it.

This construction is a reasonable one. In *Rhode Island Medical Society*, the court was discussing the

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[2] The Third Circuit's vagueness concerns were not directed at the "contemporary community standards" language. *See ACLU v. Ashcroft*, 322 F.3d at 266-69.

construction of a state, not a federal, statute. However, its comments on reasonableness were properly derived from this Court's cases dealing with both types of statutes and are germane here. The *Rhode Island Medical Society* court, in determining that every reasonable construction must be considered, relied upon a more general statutory canon of this Court and simply applied it in the context of a facial overbreadth challenge. The canon it relied upon was that courts must apply *any* reasonable construction that would be constitutional. In reaching that determination, the *Rhode Island Medical Society* court, 66 F. Supp. 2d at 306, quoted this Court's opinion in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trades Council*, 485 U.S. 586, 575 (1988) for this proposition: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." The *DeBartolo* Court, in turn, relied upon no fewer than nine cases in support of this canon of construction, *id.* at 575, including *Hooper v. California*, 155 U.S. 648, 657 (1895). The *DeBartolo* Court quoted *Hooper* for the proposition that "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[3] Thus, the *Rhode Island Medical Society* court's approach is consistent with this Court's own approach.

In *Rhode Island Medical Society*, the court was concerned that none of the competing narrowing constructions offered in defense of Rhode Island's partial birth abortion statute were reasonable because they all

[3] Although he advocated a different solution (the adoption of a national adult community standard), this same "elementary rule" animated Justice Breyer's opinion. *Ashcroft v. ACLU*, 535 U.S. at 589-90 (Breyer, J., concurring).

involved reading complex medical procedures or distinctions into the statute. 66 F. Supp. 2d at 306-07. In the instant case, by contrast, nothing need be read into the statute except a single prepositional phrase—"of the creator's community"—needed to clarify a single patent ambiguity. COPA's text, including the definitional sections, leaves completely unanswered the question, "From which community do the contemporary community standards derive?" It is certainly reasonable to answer that the community should be the community of the creator of the material. This completely eliminates the Third Circuit's concern that "every Web publisher subject to the statute [would be required to] abide by the most restrictive and conservative state's community standards . . . " *ACLU v. Ashcroft*, F.3d at 270.

. Neither is this approach undercut by this Court's statement in *DeBartolo* that, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. The approach is not undercut for the simple reason that Congress' intent cannot be determined. As the Third Circuit noted in *Reno v. ACLU*, 217 F.3d 162, 174-75, Congress claims, on the one hand, to have intended to incorporate the *Miller* standards—which are clearly geographically based—and, on the other hand, to have intended to reject *Miller's* geographically based standards in lieu of an "adult" standard. By thus expressing two mutually exclusive intentions, Congress made its real intention undiscernible. It was for this same reason that this Court refused to be bound by one of Congress' two purported intentions when it evaluated the constitutionality of the CDA in the CDA case. *Reno v. ACLU,* 521 U.S. at 874, n.39 (citation omitted)

In that case, this Court stated that "[t]he CDA, which implements the 'contemporary community standards' language of *Miller,* thus conflicts with the Conferees' own

assertion that the CDA was intended 'to establish a uniform national standard of content regulation.'" *Id.*

This same ambiguity was also recognized by various members of this Court when COPA was before it previously. For example, Justice Kennedy, joined by Justices Souter and Ginsburg wrote:

> Justice Breyer would alleviate the problem of local variation in community standards by construing the statute to comprehend the "Nation's adult community taken as a whole" . . . . There is one statement in a House Committee Report to this effect, "reflecting," Justice Breyer writes, "what apparently was a uniform view within Congress." The statement, perhaps, reflects the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the "uniform view within Congress."
>
> In any event, we need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order.

Ashcroft v. ACLU, 535 U.S. at 595 (Kennedy, J., concurring in the judgment).

Thus, under the *Rhode Island Medical Society/DeBartolo/Hooper* approach, COPA is readily susceptible to a narrowing construction whereby "contemporary community standards" is construed to mean the standards of the community of the creator of the material.

B. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is based upon an ambiguity in one phrase.

As is evident from the discussion above, the same line of reasoning indicates that COPA is readily susceptible to the recommended narrowing construction under the Tennessee Supreme Court's alternate approach to determining ready susceptibility. In *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993), the Tennessee Supreme Court declared that an ambiguity in a key term in a statute rendered it readily susceptible to a narrowing construction. Thus, for all the reasons stated above, COPA's ambiguity regarding which community's standards are to be employed renders it readily susceptible to a saving narrowing construction.

C. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" does not require this Court to draw any lines that Congress left undrawn.

Finally, under the standard articulated by this Court in the CDA case, 521 U.S. at 884, COPA is also susceptible to this narrowing construction. There, this Court declared that a statute is not readily susceptible to a narrowing construction if the Court would be called upon to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so 'involves a far more serious invasion of the legislative domain.'" *Id.* (quoting *United States v. Treasury Employees*, 513 U.S. 454, 479, n.26 (1995)).

Here, this Court would not have to draw any lines whatsoever. As the Third Circuit has acknowledged from the

beginning, when Congress enacted COPA, it was specifically attempting to address this Court's concerns about the CDA. *Reno v. ACLU*, 217 F.3d at 167. COPA "restrict[s] its scope to material on the Web rather than on the Internet as a whole; [ ] target[s] only those Web communications made for 'commercial purposes'; and [ ] limit[s] its scope to only that material deemed 'harmful to minors'." *Id.* (footnotes omitted). Thus, the lines have all been drawn in other portions of COPA's language. An exhaustive reading of all the opinions issued by this Court when COPA was previously before it shows that no member of this Court was concerned that adopting *any* of the suggested constructions of "contemporary community standards" would involve impermissible line drawing.

Thus, in sum, COPA is readily susceptible to a narrowing construction because the construction suggested is reasonable and all reasonable constructions must be adopted; because the ambiguity of a key term is an indication that the statute is readily susceptible to a narrowing construction; and because this Court is not called upon to draw any lines that Congress failed to draw.

III. STATUTORY AND CASE LAW SUPPORT EXISTS FOR CONSTRUING "CONTEMPORARY COMMUNITY STANDARDS" TO MEAN THE "CONTEMPORARY COMMUNITY STANDARDS OF THE COMMUNITY OF THE CREATOR" AND NO GOOD REASON EXISTS TO REJECT THE CONSTRUCTION.

As Justice Kennedy, joined by Justices Souter and Ginsburg, pointed out, under 18 U.S.C. § 3237 (2000), venue will lie in the community of creation and not merely in the community of receipt. *Ashcroft v. ACLU*, 535 U.S. at 601-02 (Kennedy, J., concurring in the judgment). Furthermore,

courts have explicitly held that in applying *Miller's* "contemporary community standards," the relevant standards can be those of the community of creation. *See, e.g., United States v. Cohen,* 583 F.2d 1030, 1040-41 (8th Cir. 1978) (mailed obscenity); and *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (electronic bulletin board obscenity). Interestingly, the Third Circuit discussed the *Thomas* case and even discussed some aspects of its treatment of the two communities in *Reno v. ACLU*, 217 F.3d at 176, yet failed to consider *Thomas'* insights as a basis for a narrowing construction.

Therefore, adopting the suggested construction is permissible *and* would alleviate the concerns otherwise generated by multiple possible venues, *see Ashcroft v. ACLU*, 535 U.S. at 601-02 (Kennedy, J., concurring in the judgment). Should "contemporary community standards" be construed to mean the contemporary community standards of the community of creation, prosecutions would likely be brought in the venue of creation and employ that community's standards. Should, for some reason, a prosecution be initiated in a venue of receipt, evidence could be introduced as to the contemporary community standards of the community of origin.

Furthermore, adoption of this construction meets an objection raised by this Court in *Reno v. ACLU*, 521 U.S. at 878, and re-raised by Justice Kennedy in *Ashcroft v. ACLU*, 535 U.S. at 594. This Court was worried about "a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." Adopting the narrowing construction of "contemporary community standards" suggested here completely eliminates this concern.

It is important to note that the government's failure to

raise the argument of this narrowing construction is no impediment to this Court entertaining the argument. First, as noted above, this Court has previously declared that "*every* reasonable construction *must* be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added). "Every" is not limited to those that are raised by a party. Second, this Court has explicitly stated that it will, in its discretion, entertain issues and arguments raised only in amicus briefs. *Davis v. United States,* 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

CONCLUSION

For the foregoing reasons, among others, the Third Circuit's conclusion that the ACLU would likely succeed on the merits is erroneous and, thus, it should not have affirmed the district court's order issuing a preliminary injunction. Therefore, this Court should reverse the decision of the Third Circuit.

Respectfully submitted
this 10th day of December, 2003.

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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief Amicus Curiae of the American Center for Law and Justice and United States Representatives Robert B. Aderholt, Todd Akin, Cass Ballenger, Bob Beauprez, Michael "Mac" Collins, Jo Ann Davis, Duncan Hunter, Earnest Istook, Jr., Walter Jones, Charles "Chip" Pickering, Jr., Jim R. Ryun, John M. Shimkus, and John Sullivan Supporting Petitioners

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii
INTEREST OF AMICI 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3

I. THE PROTECTION OF CHILDREN IS AN INTEREST OF THE HIGHEST IMPORTANCE 3

II. EXPOSURE TO PORNOGRAPHY HAS SERIOUS EFFECTS THAT JUSTIFY THE MINIMAL BURDEN OF COPA'S REQUIREMENTS 5

III. COPA IS A CAREFULLY DRAFTED STATUTE THAT TRACKS CURRENT FIRST AMENDMENT JURISPRUDENCE 11

IV. LESS RESTRICTIVE MEANS ARE NOT EFFECTIVE 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES *Page(s)*

American Booksellers Ass'n v. Virginia, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990) 14
American Booksellers v. Webb, 919 F.2d 1493, 1509 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991) 14
ACLU v. Ashcroft, 322 F.3d 240, 262 (3d Cir. 2003) 16
Ashcroft v. ACLU, 535 U.S. 569 (2002) 13, 14
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 4
Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997) 14
FCC v. Pacifica, 438 U.S. 726 (1978) 5
Ginsberg v. New York, 390 U.S. 629 (1968) 2, 5, 14
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 4
Miller v. California, 413 U.S. 15 (1973) 14
M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983) . 14
New York v. Ferber, 458 U.S. 747 (1982) 4
Osborne v. Ohio, 495 U.S. 103 (1990) 5
Prince v. Massachusetts, 321 U.S. 158 (1944) 5
Reno v. ACLU, 521 U.S. 844 (1997) 3, 11
Untied States v. American Library Ass'n, 123 S. Ct. 2297 (2003) 4, 15, 16
Upper Midwest Booksellers Ass'n v. City of Minneapdis, 780 F.2d 1389 (8th Cir. 1985) 14

STATUTES AND LEGISLATIVE MATERIALS

Child Online Protection Act ("COPA") ..... passim
47 U.S.C. § 231(e)(6) (Supp. IV 1998) 13-14
47 U.S.C. 230(d) (Supp. IV 1998) 17
Child Pornography Protection Act ("CPPA"), 18 U.S.C. § 2251 et seq. 4

TABLE OF AUTHORITIES—Continued

Page(s)

Children's Internet Protection Act ("CIPA"), 20 U.S.C. § 9134 4
Communications Decency Act ("CDA"), 47 U.S.C. § 223 ..... 11, 12, 13
H.R. 3783, 105th Cong. § 101 6

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Victor B. Cline, "Pornography's Effects on Adults and Children" (visited December 3, 2003) <http://mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm> 8, 10

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Victor B. Cline, "The Effects of Pornography on Behaviour," Canadians Addressing Sexual Exploitation (visited December 5, 2003) <http://www.c-a-s-e.net/The%20Effects%20of%20Porn.htm>. 8

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Donna Rice Hughes, "How Pornography Harms Children" (visited December 3, 2003) <http://www.protectkids.com/effects/harms.htm> 6, 9

Stephen J. Kavanagh, *Protecting Children in Cyberspace* (Springfield, VA: Behavioral Psychotherapy Center, 1997) 10

Multnomah County Public Library, et al. v. United States, Civil Action No. 2:01cv01322, Complaint ¶¶ 83-121 (E.D. Pa. complaint filed Mar. 20, 2001) 16

Peacefire Homepage <http://www.peacefire.com> 16-17

Joel Sanders, *The Regulation of Indecent Material Accessible to Children on the Internet*, 39 Catholic Law. 125, 129 (1999) 2

Zillman, D., and Bryant, J., *"Pornography's Impact on Sexual Satisfaction,"* Journal of Applied Social Psychology, 1988: vol. 18, no. 5 9

Zillman, D., and Bryant, J., *"Effects of Prolonged Consumption of Pornography on Family Values,"* Journal of Family Issues (Dec. 1988): vol. 9, no. 4 9

INTEREST OF AMICI*

This brief is filed on behalf of Representatives Robert B. Aderholt, Todd Akin, Cass Ballenger, Bob Beauprez, Michael "Mac" Collins, Jo Ann Davis, Duncan Hunter, Earnest Istook, Jr., Walter Jones, Charles "Chip" Pickering, Jr., Jim R. Ryun, John M. Shimkus and John Sullivan. These amici currently are members of the United States House of Representatives in the One Hundred Eighth Congress. Amici Representatives are committed to the defense of federal statutes restricting online publication of obscenity and child pornography, and the online publication of indecent materials to minors. Amici disagree with the Third Circuit's decision below and urge this Court to reverse it.

The American Center for Law and Justice ("ACLJ") is a public interest law firm dedicated to protecting First Amendment freedoms. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court eleven times.

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* This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity.

SUMMARY OF THE ARGUMENT

The present case addresses the questioned constitutionality of a federal statute designed to provide workable, reasonable boundaries around commercial Internet sites that traffic in indecent images and messages. In enacting the Child Online Protection Act ("COPA"), Congress demonstrated its constitutionally reasonable judgment that those commercial vendors of indecent materials should bear the costs of insuring that children are not likely to access their wares. The mechanisms of the challenged statute are important means of protecting children.

The Internet has become an extremely controversial and difficult area to legislate since the technology is ever changing. Publishing over the Internet, unlike in other forms of media such as print, broadcast, and video, is relatively inexpensive. Moreover, no one agency or government body watches over the content of what is placed on the Internet. The result is an open unregulated medium of communication that is highly effective. Unfortunately, the factors that make it effective also make it dangerous. The Internet is becoming the fastest growing medium for pornography distribution, and some have characterized it as the best hunting ground for pedophiles.[1]

This Court has recognized the protection of children from the influence of pornography as an interest of the highest importance. *See e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (sustaining New York law protecting children from exposure to nonobscene pornography). In furtherance of that interest, Congress passed the Child Online Protection Act (COPA). COPA is a careful response

[1] Joel Sanders, *The Regulation of Indecent Material Accessible to Children on the Internet*, 39 Catholic Law. 125, 129 (1999).

to this Court's decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). As such, it is narrowly tailored to define precisely that material which is subject to its regulations and target only that material which poses the gravest threat to our children's safety and well-being.

ARGUMENT

I. PROTECTING CHILDREN IS AN INTEREST OF THE HIGHEST IMPORTANCE

In the constitutional order, policy making is the prerogative of Congress. It does not belong to the Respondents, nor to the court below, nor even to this Court, to make or to unmake the fundamental policy judgment that the Congress embodied in the Child Online Protection Act. Instead, it is the peculiar province of Congress to make the policy judgments that lead to the enactment of legislation. Alexander Hamilton hopefully expounded,

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist No. 78, at 393-94 (G. Wills ed. 1982). That exercise of will is the essence of policy making; consequently, the exercise of will is a legislative function.

A proper respect for constitutional governance not only tends to suggest that Congress should craft laws with care so that they do not cross constitutional boundaries, but also that courts should not lightly, or with ease, resort to judicial invalidations of Acts of Congress. Yet there is little doubt that the Third Circuit's judgment evidences just such judicial ease with statutory invalidation.

Here, Congress has acted upon two policy judgments. Those policy judgments are that pornography is harmful to children and that protecting children from the harmful consequences of exposure to indecent materials is an interest of the highest order of importance.[2] Those policy judgments are longstanding, and this Court has not found them to be constitutionally suspect. Rather, this Court has acknowledged that the interest identified by Congress is compelling. "It is evident beyond the need for elaboration" that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of

[2] Congress has enacted two other measures in furtherance of its interest in protecting children from the harmful effects of pornography. In 1996, Congress passed the Child Pornography Protection Act (CPPA), 18 U.S.C. § 2251 et seq., a ban on virtual child pornography. CPPA was struck down in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), as unconstitutionally overbroad since it proscribed speech which was neither child pornography nor obscene. More recently, Congress passed the Children's Internet Protection Act (CIPA), 20 U.S.C. § 9134 (2000), which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscenity, child pornography, and material that is harmful to minors. This Court upheld CIPA in *Untied States v. American Library Ass'n*, 123 S. Ct. 2297 (2003).

young people into full maturity as citizens." 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

This Court has sustained laws protecting the psychological and physical well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." *Id. See e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute proscribing the mere possession and viewing of child pornography); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to nonobscene pornography); *FCC v. Pacifica*, 438 U.S. 726 (1978) (regulation of indecent but nonobscene radio broadcasts to protect children).

Moreover, Congress has proceeded upon the presumption that the materials affected by its legislative judgment – indecent but not obscene materials – are entitled to some form of constitutional protection. So Congress did not attempt to suppress entirely this category of communication. Instead, COPA imposes a framework for enforcing restrictions on access to commercial sites vending indecent materials. Congress's eminently reasonable judgment is consistent with the First Amendment and with this Court's decisions.

II. EXPOSURE TO PORNOGRAPHY HAS SERIOUS EFFECTS THAT JUSTIFY THE MINIMAL BURDEN OF COPA'S REQUIREMENTS

As noted, in enacting COPA, Congress acted upon the policy judgments that pornography is harmful to children and that protecting children from this harm is of the utmost

importance.[3] Those judgments are amply supported. Over the last few years, many have voiced serious concerns over the unrestricted availability of pornography on the internet. Parents responsible for the care and upbringing of today's children, and those responsible for supporting parents in that task, must find ways to protect those children from influences never imagined by previous generations. According to current statistics, nine out of ten children between the ages of eight and sixteen have viewed pornography on the Internet.[4] In a recent national survey of 1,501 regular Internet-using youth who were 10 to 17 years of age, researchers found that 25 percent had been exposed

[3] The Congressional Findings related to COPA are as follows:

(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the Internet.

H.R. 3783, 105th Cong. § 101.

[4] Donna Rice Hughes, "How Pornography Harms Children," (visited December 3, 2003) <http://www.protectkids.com/effects/harms.htm>.

in the last year to pictorial sexual material on the Internet when they didn't want it and weren't looking for it.[5] In most cases, the sex sites were accessed unintentionally when a child, often in the process of doing homework, used a seemingly innocent sounding word to search for information or pictures.[6]

Exposure to pornography interferes with a child's development and identity:

> Sexual identity develops gradually through childhood and adolescence. In fact, children generally do not have a *natural* sexual capacity until between the ages of ten and twelve. As they grow up, children are especially susceptible to influences affecting their development. Information about sex in most homes and schools, comes, presumably, in age-appropriate incremental stages based on what parents, educators, physicians, and social scientists have learned about child development. But pornography short-circuits and/or distorts the normal personality development process and supplies misinformation about a child's sexuality, sense of self, and body that leaves the child confused, changed, and damaged.
>
> The sexual excitement and eventual release obtained through pornography are mood altering. For example, if a young boy's early stimulus was pornographic photographs, he can be conditioned to become aroused through photographs. Once this pairing is rewarded a number of times, it is likely to

[5] David Finkelhor, "Helping Kids Avoid Pornography Online," UNH Crimes Against Children Research Center (visited December 7, 2003) <http://www.unh.edu/news/archive/2000/october/kb_20001020internet.html>.

[6] *Id.*

become permanent. The result is that it becomes difficult for the individual to experience sexual satisfaction apart from pornographic images.[7]

A number of studies suggest a correlation between early exposure to pornography and later sexual promiscuity and deviancy. Psychologist Victor Cline[8], an expert on sexual addiction, studied the effects of pornography on adults and children, focusing especially on pornography's potential to change or influence sexual attitudes and behavior.[9]

Cline's research in the area of sexual addiction has identified a four-step progression among many who consume pornography: (1) Addiction – causes the viewer to return for more; (2) Escalation – causes the viewer over time to need more explicit and deviant material; (3) Desensitization to the material; and (4) Acting out sexually the behaviors viewed in pornography.[10]

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[7] *Id.*

[8] Victor B. Cline testified as an expert witness at the hearings held by the COPA Commission. *See* <http://www.copacommission.org>. Cline earned his Ph.D. at the University of California, Berkeley and is presently a psychotherapist specializing in family/marital counseling and sexual addictions. He is also Professor Emeritus of Psychology at the University of Utah, Salt Lake City, Utah, President of Marriage and Family Enrichment (A nationwide seminar group) and author /editor of numerous scientific articles and books, including the book, "Where Do You Draw the Line? Explorations In Media Violence, Pornography, and Censorship."

[9] Victor Cline, "Pornography's Effects on Adults and Children" (visited December 3, 2003) <http://www.mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm>.

[10] Cline, "The Effects of Pornography on Behaviour," Canadians Addressing Sexual Exploitation (visited December 5, 2003) <http://www.c-a-s-e.net/The%20Effects%20of%20Porn.htm>.

Additionally, empirical research suggests that even nonviolent pornography has negative effects on some viewers because it models unhealthy sex roles or gives false information about human sexuality.[11] In one study, experimental subjects were exposed to repeated presentations of hardcore non-violent adult pornography over a six-week period. The exposure caused the subjects to:

- Develop an increased callousness toward women; trivialize rape as a criminal offense; to some it as no longer a crime at all;
- Develop distorted perceptions about sexuality;
- Develop an appetite for more deviant, bizarre, or violent types of pornography (escalation); normal sex no longer seemed to "do the job;"
- Devalue the importance of monogamy and lack confidence in marriage as a lasting institution; and
- View non-monogamous relationships as normal and natural behavior.[12]

According to other research, early exposure to pornography is also related to greater involvement in deviant sexual practice, particularly rape.[13] In addition, early exposure to pornography frequently results in sexual illnesses, unplanned pregnancies, and sexual addiction.[14] Research has shown that "males who are exposed to a great deal of erotica before the age of 14 are more sexually active

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[11] Zillman, D., and Bryant, J., *"Pornography's Impact on Sexual Satisfaction,"* Journal of Applied Social Psychology, 1988: vol. 18, no. 5, at 438-453; and Zillman, D., and Bryant, J., *"Effects of Prolonged Consumption of Pornography on Family Values,"* Journal of Family Issues (Dec. 1988): vol. 9, no. 4, at 518-544.

[12] *Id.*

[13] Donna Rice Hughes, "How Pornography Harms Children," www.protectkids.com/effects/harms.htm (visited December 3, 2003).

[14] *Id.*

and engage in more varied sexual behaviors as adults than is true for males not so exposed."[15]

Perhaps the most disturbing consequence of early exposure to pornography is that it causes children to act out the behavior depicted in the material against younger, smaller, and more vulnerable children, often a sibling. Cline described this as a modeling or "triggering effect" that even nonviolent pornography has on human sexual behavior, causing some individuals to want to imitate the behavior witnessed in the pornographic material.[16] Experts in the field of childhood sexual abuse report that any premature sexual activity in children always suggests two possible stimulants: experience and exposure. This means that the sexually deviant child may have been molested or simply exposed to sexuality through pornography.[17]

Cline suggests that because pornography changes attitudes and behavior, it serves as a form of destructive sex education:

> Anyone who has seen much pornography knows that most of it is made by men for male consumption; is extremely sexist; gives a great deal of misinformation about human sexuality; is devoid of love, relationship, responsibility; mentions nothing about the risks of sexually transmitted diseases, and for the most part, dehumanizes both male and female participants.

[15] K.E. Davis and G.N. Braucht, *Exposure to Pornography, Character and Sexual Deviance*, Technical Reports of the Commission on Obscenity and Pornography (1970), 7.
[16] Cline, "Pornography's Effects on Adults and Children," www.mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm.
[17] Stephen J. Kavanagh, *Protecting Children in Cyberspace* (Springfield, VA: Behavioral Psychotherapy Center, 1997), 58-59.

> Pornography portrays unhealthy or even anti-social kinds of sexual activity, such as sado-masochism, abuse and humiliation of the female, involvement of minors, incest, group sex, voyeurism, exhibitionism, bestiality, etc. If we just examine its educative impact, it presents us with some cause for concern.[18]

COPA is a necessary measure to protect children from the harm that could be done to them by pornography on the Internet.

III. COPA IS A CAREFULLY DRAFTED STATUTE THAT TRACKS CURRENT FIRST AMENDMENT JURISPRUDENCE

COPA is not Congress's first attempt to protect children from the dangers of Internet pornography. Prior to COPA, Congress enacted the Child Decency Act of 1996 (CDA) which was held unconstitutional in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). This Court found the CDA to be overly broad because in denying minors access to potentially harmful material, it suppressed a large amount of speech that adults have a constitutional right to receive. *Id.* at 874. That Congress paid careful attention to this Court's decision in *Reno* is evident in the substantial differences between COPA and the CDA.

[18] Cline, "Pornography's Effects on Adults and Children" (visited December 7, 2003) <http://ww.moralityinmedia.org>.

The following key points of distinction exist between CDA and COPA:

CDA	COPA
Breadth of Reach	
applied to all Internet communication, including e-mail, listservs, newsgroups, chat rooms, and the World Wide Web	applies only to materials on the World Wide Web
Scope of Materials Covered	
applied to any material that was "indecent" or "patently offensive," without defining those terms	applies only to material that satisfies a specific three-prong standard
Minors Affected	
minor is any person under the age of 18	minor is "any person under 17 years of age"
Actors Affected	
applied to commercial entities or transactions, to all nonprofit entities, and to individuals posting messages on their own computers	applies only to those Web communications that are made "for commercial purposes"
Impact on Family Governance	
barred parents from permitting their children from using a family computer to view regulated material	contains no such prohibition

- The changes made in COPA cure any constitutional infirmities that were present in previous legislation.

In its prior consideration of COPA in this case, the Court directly compared COPA to the CDA and itself outlined COPA's narrower scope:

> Apparently responding to our objections to the breadth of the CDA's coverage, Congress limited the scope of COPA's coverage in at least three ways. First while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made "for commercial purposes." And third, while the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors."

Ashcroft v. ACLU, 535 U.S. 564, 569-70 (2002). In spite of this Court's observations about COPA's narrowed reach, the Third Circuit concluded that COPA, and its definition of "material that is harmful-to-minors" in particular, is still not narrowly tailored.

COPA defines "material that is harmful to minors" as

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998). This Court specifically considered COPA's definition of "material that is harmful-to-minors" and concluded that it was consistent with current First Amendment jurisprudence: "[COPA] defines the harmful-to-minors material restricted by the statute in a manner parallel to the *Miller* definition of obscenity." *Ashcroft v. ACLU*, 535 U.S. 564, 578 (2002). COPA's three-prong harmful-to-minors standard also mirrors the statutory language examined and approved by this Court in *Ginsberg v. New York*, 390 U.S. 629, 646 (1968). Finally, this standard is used by countless state statutes across the country to restrict the sale and even the display of material that is harmful to minors.[19]

The grounds asserted by Respondents and accepted by the Third Circuit to find that COPA is not narrowly tailored and that its definitions are vague are specious at best. Respondents have proven rather imaginative in their efforts to make words that are clear and commonly understood

[19] *See e.g., Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *American Booksellers v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

(such as minor) appear wrought with ambiguity such that no reasonable interpretation could exist.

Respondents' also claim that COPA's requirements, such as the age verification, are too burdensome to the right of adults to access pornography on the Internet. State laws that require commercial vendors to place "harmful-to-minors" material behind blinder racks, in sealed wrappers, or inside an opaque cover and to obtain proof of adult status for purchase of such materials provide a useful analogy. The alleged burden which COPA places on commercial websites and its patrons should be viewed no differently than those imposed at the state level, requiring a grocery store, for example, to shield indecent magazines from unsuspecting minor patrons. At worst, COPA's requirements create a slight inconvenience; requiring adults to verify their age to access indecent online materials does not rise to the level of an unconstitutional burden.

Respondents' also portray as a constitutional crisis the possibility that some adults will be deterred or too embarrassed to pursue the material beyond these age verification screens. The potential for embarrassment is no reason to needlessly subject millions of children to pornography's dangers. As a plurality of this Court stated in *United States v. American Library Ass'n*, 123 S. Ct. 2297, 2307 (2003), "the Constitution does not guarantee the right to acquire information . . . without any risk of embarrassment." Moreover, given the known risks posed to children, it is altogether appropriate that the adult users and the Web site operators should bear the relatively minor burden associated with keeping harmful material away from minors.

IV. LESS RESTRICTIVE MEANS ARE NOT EFFECTIVE

The Third Circuit, as well as Respondents, seem to suggest that the existence of user side filters and blocking software – a less restrictive technology – is definitive when it comes to whether COPA is narrowly tailored. The court took the position that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material online." *ACLU v. Ashcroft*, 322 F.3d 240, 262 (3d Cir. 2003). To conclude that COPA is not narrowly tailored because filtering software used by parents is less restrictive mischaracterizes the issue. COPA requires Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under the less restrictive alternative view adopted by the Third Circuit and pressed by Respondents, there would be no entity that Congress could subject to filtering requirements.

Perhaps more significant is the limited efficacy of blocking software.[20] Filters can block inoffensive materials while failing to screen other, offensive materials. Moreõver, computer-savvy minors can easily defeat such filtering programs.[21] And filtering software is not cheap to buy, or

[20] Ironically, the ACLU, in another case, specifically argued that filtering technology was ineffective and unreliable in an effort to defeat a federal law which made the use of filtering software by public libraries a condition of the receipt of federal funding. *See Multnomah County Public Library, et al. v. United States,* Civil Action No. 2:01cv01322, Complaint ¶¶ 83-121 (E. D. Pa. complaint filed Mar. 20, 2001). The Supreme Court of the United States ultimately upheld the law, the Child Internet Protection Act (CIPA), in *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003). Now the ACLU argues that COPA is unconstitutional because filtering is a less restrictive alternative.

[21] Minors who want to crack filtering programs find plenty of assistance on the World Wide Web. One site, for example, "Peacefire" offers

cheap to maintain. Finally, because the content of the Internet is ever-changing, it is virtually impossible for blocking software and filtering technology to keep up.

It is an error in the Respondents' logic to set the requirements of COPA up against filtering software; they are not mutually exclusive. Congress was aware that the two approaches could operate in a synthesis, and intended that they do so to protect minors from exposure to harmful materials. *See* 47 U.S.C. 230(d) (Supp. IV 1998) (requiring Internet service providers to notify customers of the availability of blocking software). Disputes over comparative effectiveness of these alternatives are beside the point. More pertinent is the question whether Congress's plan – the consequence of which is that the structures provided by COPA operate jointly with parental or other blocking software – is significantly more effective in blocking minors' access to harmful materials than blocking software alone.

Because of the care taken by Congress, COPA is, in fact, the least restrictive means to accomplish the compelling interest in protecting minors from the harm associated with exposure to indecent materials on the World Wide Web.

CONCLUSION

With the enactment of COPA, Congress sought to provide minimal protections to America's youth from the most sordid materials being circulated on the World Wide Web under the guise of being "protected speech." Congress

cracking advice on every major filtering program currently marketed in the United States. *See* Peacefire Homepage (visited December 5, 2003) <http://www.peacefire.com> (offering links to cracking instructions for CYBERsitter, Cyber Patrol, Net Nanny, BESS, SmartFilter, X-Stop, and I-Gear).

soundly and soberly took stock of real dangers to America's soul, and responded with care and precision to those dangers. In doing so, Congress simply sought to ward off the threat once recognized by Franklin D. Roosevelt: "the nation that destroys its soul destroys itself."

The requirements imposed by COPA will not destroy the Internet. The measures prescribed by COPA do not trench upon the rights guaranteed by the First Amendment. COPA simply places a reasonable restriction on access to commercially marketed indecency to prevent access to such materials by minors. COPA, along with CPPA and CIPA, is an important, constitutionally sound step taken by Congress to address this egregious problem.

For the foregoing reasons, and those expressed in Petitioner's brief, this Court should reverse the Third Circuit's judgment.

Respectfully submitted,

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In The
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit
(following remand)

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*,

SENATOR JOHN S. MCCAIN,
REPRESENTATIVE MICHAEL G. OXLEY,
REPRESENTATIVE JAMES C. GREENWOOD,
REPRESENTATIVE THOMAS J. BLILEY, JR. (RET.),

IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF CONGRESSIONAL *AMICI CURIAE* 1

CONSENT TO FILE BRIEF 1

SUMMARY OF ARGUMENT 2

LAW AND ARGUMENT 5

I. COPA IS FACIALLY CONSTITUTIONAL. THE THIRD CIRCUIT'S INTERPRETATION, INVALIDATING THE ACT, WAS CLEARLY ERRONEOUS. 5

II. COPA IS A VALID CONGRESSIONAL EXERCISE OF LEGISLATIVE POWER DIRECTED AT MITIGATING THE SEVERITY OF A *KNOWN PROBLEM* WITH RESPECT TO THE INDISCRIMINATE DISSEMINATION BY COMMERCIAL VENDORS OF "OBSCENE" WORLD WIDE WEB PORNOGRAPHY TO MINORS. 18

III. COPA SHOULD NOT HAVE BEEN SUBJECTED TO STRICT SCRUTINY AND SHOULD BE UPHELD UNDER AN INTERMEDIATE LEVEL OF REVIEW, BUT CAN MEET EITHER LEVEL OF SCRUTINY, IN ANY EVENT. 20

IV. COPA IS NOT SUBSTANTIALLY OVERBROAD. 21

CONCLUSION 26

APPENDIX (Copy of COPA provisions) 29

TABLE OF AUTHORITIES

CASES

ACLU v. Reno, 322 F.3d 251 (3rd Cir. 2003) 9, *passim*
ACLU v. Reno, 217 F.3d 162 (3rd Cir. 2000) 26
ACLU v. Reno, 31 F.Supp.2d 473 (E.D. Pa. 1999) 27
ApolloMedia Corp. v. Reno, 19 F.Supp.2d 1081 (N.C. Cal. 1998) 13
Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 23
Ashcroft v. ACLU, 535 U.S. 564 (2002) 23
Board of Education v. Pico, 457 U.S. 853 (1982) 14
Board of Trustees of SUNY v. Fox, 492 U.S. 469 (1989) 22
Broadrick v. Oklahoma, 413 U.S. 601 (1973)) 22
Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of NY, 447 U.S. 557 (1980) 21
Erie v. Pap's A.M., 529 U.S. 277 (2000) 21
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 9
Flying Eagle Publications v. United States, 285 F.2d 307 (1st Cir. 1961) 13
Ft. Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 25
FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 23
Ginsberg v. New York, 390 U.S. 629 (1968) 5, 6, 14
Ginzburg v. United States, 383 U.S. 463 (1966) 9
Hamling v. United States, 418 U.S. 87 (1974) 9
Hohe v. Casey, 868 F.2d 69 (3d Cir. 1989) 25
Jenkins v. Georgia, 418 U.S. 87 (1974) 12
Kois v. Wisconsin, 408 U.S. 229 (1972) 13
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 21
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 13
Miller v. California, 413 U.S. 15 (1973) 2, 12-14
New York v. Ferber, 458 U.S. 747 (1982) 4, *passim*
Penthouse v. McAuliffe, 702 F.2d 925 (11th Cir. 1983) 13
Pope v. Illinois, 481 U.S. 497 (1987) 14
Reno v. ACLU, 521 U.S. 844 (1997) 13, 22

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 21
Sable Communications of Cal. v. FCC, 429 U.S. 115 (1989) 15
Smith v. United States, 431 U.S. 291 (1977) 14
Splawn v. California, 431 U.S. 595 (1977) 9
Texas v. Johnson, 491 U.S. 397 (1989) 21
United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) 3, 13
United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973) 10
United States v. Hockings, 129 F.3d 1069 (9th Cir. 1997) 3
United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 13
United States v. O'Brien, 391 U.S. 367 (1968) 21
United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) 10
Valley Forge College v. Americans United, 454 U.S. 464 (1982) 23
Watson v. Buck, 313 U.S. 387 (1941) 22

STATUTES

Child Online Protection Act of 1998 (COPA), 47 U.S.C. § 231 (Copy in Appendix) 1, *passim*
Federal Obscenity Statutes, 18 U.S.C. § 1466 3, 24, 27

OTHER AUTHORITIES

Committee Report on COPA ("House REPORT"), Report to accompany H.R. 3783, House Committee on Commerce, H. REPT. No. 105-775 (October 5, 1998) 1, *passim*

Commercial Distribution of Material Harmful to Minors on World Wide Web ("Senate REPORT"), Report on S. 1482, Senate Committee on Commerce S. REPT. No. 105-225 (June 25, 1998) 1, *passim*

CONG. REC.-SENATE, S. 12146-54 (daily ed., November 8, 1997), Sponsor's Floor Statement on COPA, by Senator Coats 19

HEARING ON LEGISLATIVE PROPOSALS TO PROTECT CHILDREN FROM INAPPROPRIATE MATERIALS ON THE INTERNET ("HOUSE HEARING on COPA") House Committee on Commerce, 105th Cong., 2d Sess., (September 11, 1998) 19

BRIEF(S) OF MEMBERS OF CONGRESS AS AMICI CURIAE,
ACLU v. Reno, No. 98-CV-5591 (LAR) (E.D. Pa. 1999) 1, 15
ACLU v. Reno, No. 99-1324 (3d Cir. 2000) 1, 15
Ashcroft v. ACLU, No. 00-1293 (2001) 1, 26
ACLU v. Ashcroft, No. 99-1324 (3d Cir. 2003) 1

Goodenough, "Online Porn Driving Sexually Aggressive Children," *CNSNews.com* (November 26, 2003) 7
Gottlieb, "GABAergic Neurons", Scientific American (1989) 7
Gralla, *How the Internet Works* (1999) 8
Institute of Medicine, "Research on Children & Adolescents with Mental, Behavioral & Developmental Disorders" (1989) 7
NIBRS, "Sexual Assault of Young Children as Reported to Law Enforcement" (2000) 7
Pinchot, *The Human Body: The Brain* (1984) 7
Reisman, "Biologically Arousing Sexual Imagery as Psychopharmacological 'Toxic Media' 'Harmful to Minors,' Overriding Left Hemisphere Cognition, Subverting Informed Consent and Free Speech" (1993, 1996) 6
Reisman, *Kinsey, Crimes & Consequences* (1998, 2000, 2003) 6

INTEREST OF *AMICI CURIAE*

Amici Curiae are the principal Congressional sponsors of the *Child Online Protection Act* of 1998 ("COPA" or "the Act"). Senator John McCain was Chairman of the Senate Committee on Commerce and Representative Tom Bliley (ret.) was Chairman of the House Committee on Commerce, which authored REPORTS to accompany COPA (H. REPT. No. 105-775 and S. REPT. No. 105-225). Representatives Michael Oxley and James Greenwood were primary sponsors in the House. (Senator Dan Coats (ret.), original sponsor of the Act, was an *amicus* below, but is now an Ambassador of the United States and cannot join in this Brief.) These gentlemen filed BRIEF(S) OF MEMBERS OF CONGRESS AS *AMICI CURIAE* in the District Court, the Third Circuit (twice), and in this Court on first appeal, to present their views on the intent of Congress concerning the meaning and applicability of COPA. Your *amici* submit that the decisions below are contrary to this Court's precedent and the legislative intent of the Congress. These *amici* submit arguments not presented by the parties below and may not otherwise be submitted to this Court.[1]

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Carol A. Clancy and Co-Counsel Bruce A. Taylor of the National Law Center for Children and Families ("NLC") and no part of the brief was authored by any attorney for a party. No person or entity other than the NLC, *amici curiae*, or their counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The *Child Online Protection Act* of 1998 is a facially constitutional, limited statute that narrowly addresses a Congressional and public concern about continued proliferation of the obscene (hard-core) and obscene for minors (soft-core) pornography that is currently being disseminated indiscriminately by commercial pornographers to minors using the World Wide Web. The Congressional REPORTS that accompanied COPA state the legislative basis and intent of the Act. *See* S. REP. No. 105-225 and H.R. REP. No. 105-775. COPA was drafted to conform to the special demands of the medium of the Web and to the traffic in "commercial pornography" (as repeatedly stated in the REPORTS). It differs from "geographic" or "non-specific" approaches to "community standards" that have been approved for judging obscenity in other mediums. COPA created an "*age*" standard, in which what is obscene for the respective under-17 audience; *i*.e., the age group of the probable recipient minors, is measured by the views of the American adult community as a whole. *See* House REPORT at 28. The decision by Congress to adopt a "non-geographic", "age-based", "adult" community standard for judging how to measure the prurience and offensiveness prongs of COPA was proper for the legislative branch.

COPA narrowly and specifically applies channeling obligations only with respect to commercial Web sites: (1) that regularly engage in the business of selling, and (2) then knowingly make available to minors, that type of pornography that meets the *Millerized-Ginsberg*[2] definition in Section 231(e)(6) that is obscene or obscene for minors. As such, this two part burden of proof on the Government,

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[2] *Ginsberg v. New York*, 390 U.S. 629 (1968), *Miller v. California*, 413 U.S. 15 (1973), *et seq*.

like that under 18 U.S.C. § 1466,[3] would require a federal jury and the federal courts to find that an offender of COPA regularly sought profit from dissemination of pornography that was obscene or obscene for minors and then made available specific pornographic material that is obscene for minors under the definition of what is "harmful to minors".

Finally, COPA's requirement that the material be "taken as a whole" meets the Constitutional requirements for how variable obscenity must be judged under *Ginsberg, supra*. While the *material*[4] distributed must be judged as a whole, the *mechanism of distribution* (here, a Website) *is immaterial. Compare United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (holding that GIF files fall within the obscenity statutes, though not specifically mentioned, because "the manner in which the images move[ ] does not affect their ability to be viewed on a computer screen in [a distant location] or their ability to be printed out in hard copy in that distant location"), *cert. denied,* 117 S.Ct. 74 (1997). *Accord, United States v. Hockings,* 129 F.3d 1069, 1072 (9th Cir. 1997) ("We conclude that computer GIF files are visual depictions within the meaning of the charging statute. The visual image transported in binary form starts and ends pornographically and that is what Congress seeks to prohibit). Under COPA, in order to establish a variable obscenity crime, the prosecution need not have to prove that the "entire website" be taken as a whole as obscene. The HTM material involved in a particular offense on a Website may factually consist of matter posted on one page, or posted on one hundred pages, depending on how an offender set it

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[3] Congress intended 47 U.S.C. § 231(e)(2) ("commercial purposes; engaged in the business" to parallel 18 U.S.C. § 1466, as stated in S. REP. No. 105-225, at 11, and H.R. REP. No. 105-775, at 27.

[4] "Material" is defined at 47 U.S.C. § 231(e)(6) as any "communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or meets the definition for HTM (obscene for minors).

up. While not constitutionally required, under COPA, evidence relating to the "entire website, in whole or in part" may have relevance to the issues, as providing the context of distribution and as evidence of the obscenity (because of pandering) or non-obscenity (because of the presence of mitigating factors) of material made available.

The Third Circuit has twice evaded its obligation to judicially construe COPA so as to save it and committed clear error by basing its most recent decision to overturn COPA on facts not supported by the record, and by completely disregarding COPA's legislative history. The court made clearly erroneous findings about COPA's actual requirements and relied on factual and legal errors as foundation for the wrongly decided outcome. The Third Circuit incorrectly applied strict scrutiny, analyzing COPA as though it regulated *non-commercial* speech. COPA applies only to *commercial* activities, and involves the dissemination of material not protected in the context in which it is *knowingly* disseminated to minors. However, COPA's requirements are necessary and should survive any level of scrutiny, because only COPA's use of criminal penalties can: (1) effectively deter the described unconscionable *commercial* behavior, (2) adequately protect children from known harm, and (3) prevent misuse of an important channel of federal communication.

Both the District Court and the Court of Appeals have ignored and refused to follow the prior mandate of this Court to properly apply and construe, when necessary, federal statutes in constitutional fashion. *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982). Therefore, this Court should authoritatively construe this federal statute forthwith, should reverse the decision of the Court of Appeals which affirmed the judgment of the District Court, vacate the Preliminary Injunction issued as having been improvidently granted, and render instead a narrowing authoritative judicial construction of COPA, consistent with its legislative purpose

and Congressional intent, which furthers the policy of federal statutory construction that courts should give legislation a saving construction in order to avoid constitutional conflict and avoid or prevent unnecessary constitutional questions.

When COPA is so construed, as intended in the House and Senate REPORTs and sponsor statements, all the lower federal courts, as triers of fact and on judicial review, may properly arrive at judgments as to whether certain hard or soft core pornography is "harmful for minors" by applying the viewpoint of the average adult person, applying American adult standards with respect to what is obscene for minors, when taken as a whole, predominantly appeals to a prurient interest in nudity, sex, or excretion with respect to the probable and recipient age group of minors and whether the sexual depictions or descriptions are presented in a patently offensive way with respect to the probable and recipient age group of minors. The final prong is not judged with reference to community standards, but is determined by the more universal judgment of a reasonable person's finding as to whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value for the probable and recipient age group of minors to which it is directed or to whom the distributor knowingly displays the pornography.

ARGUMENT

I. COPA IS FACIALLY CONSTITUTIONAL. THE THIRD CIRCUIT'S INTERPRETATION, INVALIDATING THE ACT, WAS CLEARLY ERRONEOUS.

More than 35 years ago, in the landmark case of *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court recognized that governments have the right to assist parents in protecting minor children from exposure to harmful pornography and also have an independent interest in protecting minors from such harm. The Court articulated

and approved a definition for "material harmful to minors" (HTM) or "variable obscenity", in which the definition of "Obscene For Minors" (OFM) is modified to conform to the characteristics of the actual recipient audience: minor children under age 17.

"Children are our future", it's often said. The healthy development of that future is imperiled by children's exposure to harmful pornography, especially if "permitted" by Society.[5] The brain is an incredibly complex and powerful system. Sophisticated medical diagnostic techniques confirm that images override text for brain dominance and research indicates that a pornographic environment "colonizes" in a viewer's brain, producing structural changes in the brain that are involuntary and can last for years.[6] Neurologists question which of the brain's hemisphere will gain control of shared functions and

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[5] *See Ginsberg*, 390 U.S. at 642, n. 10, quoting Dr. Gaylin of the Columbia Univ. Psychoanalytic Clinic, in 77 Yale L.J., at 592-94:

> "It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control - it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging."... To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval - another potent influence on the developing ego."

[6] *See* Dr. Judith A. Reisman, *Biologically Arousing Sexual Imagery as Psychopharmacological "Toxic Media" "Harmful to Minors," Overriding Left Hemisphere Cognition, Subverting Informed consent and Free Speech,* (1993, 1996). Grant for the Ontario Human Rights Commission, Ontario, Canada, on "Pornography: Neurochemical Effects on Women...." *See also* Reisman, *Kinsey, Crimes & Consequences,* (1998, 2000, 2003), IME, Louisville, KY, Chapter 8.

dominate overt behavior, in light of the fact every second millions of messages bombard the brain and carry information from the body's senses.[7] Inhibitory transmitters help to shape the neural networks that underlie all behavior and control negative behavioral responses.[8] There is evidence that the inhibitory health function of a minor's nervous system can be critically stressed by pornographic imagery. This is of particular concern, since health statistics indicate that a significant percentage of minors may be highly vulnerable to the toxic effect of pornographic stimuli. Researchers claim that 25 percent of the population of the United States is under age 18, and at least 12 percent of these minors have diagnosable mental illness.[9] Current Department of Justice data indicate that 67 percent of all sex abuse victims are minors, and of these, 34 percent are under age 11, and 14 percent are under age 5.[10] According to an Australian study, exposure to online pornography is a "key factor" in the increase of incidents involving young children committing sexual offenses, including "oral sex and forced intercourse," against other children. [11]

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[7] Roy Pinchot, Ed., THE HUMAN BODY: THE BRAIN 122-123 (Torstar Books, 1984), quoting Neurologist David Galin.

[8] *See* David Gottlieb, "GABAergic Neurons," *Scientific American*, at 82, 88 (January 1989).

[9] The Institute of Medicine, Division of Mental Health and Behavioral Medicine, RESEARCH ON CHILDREN & ADOLESCENTS WITH MENTAL, BEHAVIORAL & DEVELOPMENTAL DISORDERS 1 (National Academy Press, Washington, D.C.: 1989).

[10] *See National Incident-Based Reporting System (NIBRS),* SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, 2 (July 2000).

[11] Patrick Goodenough, "Online Porn Driving Sexually Aggressive Children," Nov. 26, 2003, *CNS News.com*, available at http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200311/FOR20031126a.html.

If children are raised on a steady mental diet of adult pornography that is Obscene For Minors, their lives will evidence the negative effect of harms that this Court has recognized from commercial pornography. As noted in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973):

> The sum of experience ... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

In order to protect children from a major source of this harm, *COPA* restricts only commercial pornsites on the World Wide Web (the Web)[12] from indiscriminately, yet knowingly, disseminating HTM-porn to minors, and requires that a commercial Website that sells HTM-porn refrain from knowingly making pornography available to minors, yet protects pornsites that try to verify "adult status" through use of credit cards, adult access codes, adult PIN numbers, or other technologies that are either currently available or developed in the future. In enacting COPA, Congress studied and closely relied upon *Ginsberg* and other precedents in this important area of public concern.

Under established case law, the act of knowingly disseminating to minors pornography that is HTM-OFM is

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[12] Unlike the Communications Decency Act of 1996 and 2003 (CDA), COPA only applies to commercial WWW sites and does not apply to other "interactive computer services," such as non-Web based Internet, Usenet, email, BBS, chat, or other online services. By 1998, the Web was a rapidly growing system to which one could connect *via* the Internet or directly by phone line, but it must be remembered that these online systems and networks are <u>not</u> the same and COPA only applies to sites on the WWWeb, a fact often overlooked by the courts below. *See* Senate REPORT at 2 and House REPORT at 12. *See also* Preston Gralla, *How The Internet Works, Millennium Ed.*, 127 (QUE, Indianapolis, 1999).

not protected by the First Amendment. Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from protected speech depends on the medium. *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

Recognizing the unique nature of the medium (*i.e.* display and dissemination of harmful pornography on the commercial Web) and balancing actual harm to minors being perpetrated by current commercial business practices, the Congressional intent expressed in its REPORT of the House Committee on Commerce, H. REPT. No. 105-775, at 28, was that COPA was to be adapted to the Web by using a medium-specific standard of what the American adult-age community as a whole would find prurient and offensive for minors of the recipient age group. Specific facts concerning the circumstances of production, site design, marketing, search engine magnet headers and meta tags, and evidence of "pandering" to targeted audiences should be considered in context on a case-by-case basis to show who may be included in an intended and probable recipient group.[13]

The Third Circuit again refused to adopt a Congressionally intended customization of the "harmful to minors" test and then erroneously interpreted the Act in an unconstitutional way. *ACLU v. Ashcroft*, 322 F.3d 251, 255, 268 (3d Cir. 2003). Both the Court of Appeals and the District Court failed to properly construe this federal statute so as to save it for valid application within constitutional boundaries. The lower courts failed to follow the mandate of this Court to properly apply and construe, when necessary, federal statutes in a constitutional fashion. *New York v.*

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[13] Evidence of "pandering" is relevant, as a matter of First Amendment obscenity law, in establishing all three prongs of the HTM test in COPA. *Ginzburg v. United States*, 383 U.S. 463, 470 (1966); *Hamling v. United States*, 418 U.S. 87, 130 (1974), *Splawn v. California*, 431 U.S. 595, 598-99 (1977)

Ferber, 458 U.S. 747, 769, n. 24 (1982), *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 122, n.7 (1973), *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971).

The Court of Appeals' instant refusal, 322 F.3d at 252-55, to narrowly construe COPA's definition of "Harmful To Minors" was especially egregious. The Act is capable of authoritative construction within a constitutionally valid scope, as specifically invited and intended by Congress, as a limitation on the test for what is "Obscene For Minors" to a non-geographic "adult" *age* community standard, rather than a territorial *geographic* community standard. This error warrants reversal and correction by this Court, which should enter the judgment that should have been entered below.

There are many essential considerations, involving statutory construction, legislative history, First Amendment jurisprudence, and the separation of powers, which the courts below failed to follow, including:

(A) the severity of the *known problem* with respect to the indiscriminate dissemination by commercial vendors of Web pornography of "free porn" and free porn "teasers" which are freely made available to minors, as well as adults;

(B) the express articulation of Congressional concern for protecting both minors *and* the rights and duties of adults in the dissemination and receipt of *commercial* products using federal channels of communication and Interstate Commerce; and

(C) the clear explication by Congress in the Senate and House REPORTS of the limitations on the manner in which COPA can be applied.

On remand from this Court, the Court of Appeals in affirming the District Court's grant of a preliminary injunction against enforcement of the HTM provisions of COPA, committed clear error in misapplying the law, and made clear misjudgments of fact in considering the proof, when it concluded that:

(1) Plaintiffs had established substantial likelihood of prevailing on a claim that COPA, as to HTM, was not narrowly tailored to achieve the Government's compelling interest and therefore failed a strict scrutiny test under the First Amendment, 322 F.3d at 251, 265-66, 271; and that

(2) Plaintiffs had established a substantial likelihood of prevailing on a claim that COPA, as to HTM, was unconstitutionally overbroad, 322 F.3d at 251, 266-67, 271.

The Court of Appeals likewise committed clear error in misinterpreting the law, and committed clear mistake in considering the proof, in each of its six substantive holdings. The court below was wrong in the following findings:

(1) that COPA's definition of "material that is harmful to minors", 47 U.S.C. § 231(e), was not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and therefore failed strict scrutiny under the First Amendment, 322 F.3d at 251-55, 267-68. The courts below should have fulfilled their obligations to find that COPA adopted the constitutionally proper test of "HTM", which is a "legal term of art" for pornography that is Obscene For Minors. To the extent that the courts below believed they could conclude that any part of the test was unclear or capable of overbreadth, the courts had the power and the duty to authoritatively construe the Act so as to clarify any perceived vagueness and narrow any perceived potential for overbroad applications; and

(2) that the definition of "commercial purposes", § 231(a)(1), was not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and therefore failed a strict scrutiny test, 322 F.3d at 251, 256-57, 269. COPA limits the reach of the statute to those "engaged in the business" of selling pornography that is at least obscene for minors. The courts below erroneously read the Act so broadly that they wrongly included Web publishers who have posted any material that involved nudity or sexual information on their Websites,

even if *non-prurient* or *not patently offensive within the meaning of the statute*[14], and even if they did not try to make a profit from such material or did not post such material as a principal business purpose, and then concluded that the Act, as thus read, subjected too wide a range of Web publishers to potentially improper liability. [15] This error can be avoided

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[14] The hypothetical "examples" given by the Circuit, 322 F.3d at 267-68, *do not meet the substantive requirements* of the HTM test set forth in COPA. The Third Circuit's interpretive error, 322 F.3d at 267-68, regarding what constitutes HTM under COPA's definition, is analogous to the error in *Jenkins v. Georgia*, 418 U.S. 153 (1974), where the movie *Carnal Knowledge* did not meet the definitional elements of the obscenity test of *Miller, supra,* 413 U.S. at 24-25, because it did not actually depict sexual conduct. Offensive implication is not enough. Under COPA, no one can be subject to prosecution for the distribution of materials that do not depict or describe specified sexual acts, in a way that average adults would find prurient and patently offensive with respect to minors and a reasonable adult would find lacking serious value for minors. § 231(e)(6)(A)-(C).

[15] In an appropriate case it would be conceptually possible to charge a website operator with the maintenance of a Website, which, taken as a whole, is HTM. However, the Third Circuit wrongly asserted that every obscenity-related HTM prosecution involving matter disseminated via Websites must always include an attack on the "entirety of the website." This proposition is without merit, and must be rejected. On one hand, the court argues that whether one image is HTM can be judged only in relation to its context of distribution (the Website) (which is a true statement). The court then wrongly extrapolates (without justification) that this requires that no individual data file available for dissemination at a website can be declared HTM without first finding that the *entire* Website is HTM (which is an untrue statement). Under the interpretation suggested by the Third Circuit, to avoid prosecution under COPA, defendants would only have to "post" volumes of innocuous, unrelated material in order to use their "website" as a "shield" against prosecution, by arguing that the prosecution must establish that *all* of the thousands of

by courts properly applying and interpreting COPA, as Congress intended, as applicable only to commercial Websites knowingly engaged in the business of attempting to profit from adult pornography that is Obscene or Obscene For Minors and knowingly making such pornography available to minors; and

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electronic data files (posted and made accessible to the public at the same Website) are HTM. *See Miller v. California*, 413 U.S. at 25, n. 7, where the Court, in rejecting as a constitutional standard the "utterly without redeeming social value test" of *Memoirs v. Massachusetts*, 383 U.S. at 419, stated: "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." Citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). *See, also, Penthouse International v. McAuliffe*, 702 F.2d 925 (11th Cir. 1983) (insertion of obscene photographs between the pages of the Bible was insufficient to save the work from being found obscene); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984) (obscene pictures attached to a political letter still fall into the category of obscene work); *Flying Eagle Publications v. United States*, 285 F.2d 307 (1st Cir. 1961) (a bucolic account of a Sunday school picnic did not save sexually graphic pictures of a Roman orgy from being declared obscene).

In a prosecution under COPA, the named defendants -- and not a "website" -- are on trial. The criminal act alleged (with respect to the variable obscenity charge) is the act of the *knowing distribution* to minors of *specifically named material constituting variable obscenity, or HTM.* This Court's obscenity tests, whether for adult obscenity under *Miller* or variable obscenity under *Millerized-Ginsberg*, applies to crimes using computers and online networks, as it does for any other means of transportation or communication and the courts below were wrong to try to exclude "cyberspace" from the reach of federal law. *See Reno v. ACLU,* 521 U.S. 844, at 877, n. 44 (1997) (federal law prohibits the cyberspace transmission of obscene matter); *ApolloMedia Corp. v. Reno,* 19 F.Supp.2d 1081 (N.C. Cal. 1998), *judgment aff'd,* 526 U.S. 1061 (Mem.) (1999) (federal law prohibits transmission of obscene emails); and *United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996), *cert. denied,* 117 S.Ct. 74 (1997).

(3) that the "affirmative defenses" available to Websites under § 231(c)(1) were not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful pornography and failed its strict scrutiny test as a severe burden on adult access to protected speech and failed to provide sufficient freedom from prosecution for innocent Web publishers. 322 F.3d at 251, 257-61, 269-70. The Congressional record is clear that COPA, properly applied as intended, has no application and poses no threat of prosecution for those operators who were not intended by Congress to be subject to the Act. Non-profit, educational, government, media, advocacy, and all other sites that do not regularly sell sexually explicit adult pornography that could meet the traditional legal test for HTM-OFM, do not meet COPA's substantive definition of "prohibited conduct," which definition is limited even further by COPA's adoption of a *non-geographic American adult community "age" standard* for prongs one and two, and the *reasonable adult person standard* for prong three, and was mandated by this Court's cases,[16] and was intended by Congress to avoid misapplications of the Act. With respect to the "affirmative defenses," there is no credible evidence that the Act's technical devices are not available to commercial porn-sites, which already accept credit cards and adult PINs. Based on the record, *see* Joint Stipulation of Uncontested Facts at the preliminary injunction hearing (Joint Exhibit 3), set forth in 31 F.Supp.2d at 481-92, the courts below were wrong in finding that technological screening of users for the purpose of age verification are unreasonable or unavailable to commercial porn-Websites to

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[16] *See* Senate REPORT at 7, 12-13, and House REPORT at 12-13, 27-28, citing *Ginsberg, supra*, *Miller v. California*, 413 U.S. at 24-25 (1973), *Smith v. United States*, 431 U.S. 291, 301-02, 309 (1977), and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987), as well as *Board of Education v. Pico*, 457 U.S. 853 (1982) and other cases, to limit application of HTM to pornography.

which the Act could properly apply. Under available technology, porn-Websites can request an adult customer to use an adult verification service or other adult information prior to accessing "adult" pornography, or present a credit card for non-charge verification, or, we submit, even enter just a credit card number that passes the free mathematical test of a "Luhn Check Algorithm" under § 231(c)(1)(C);[17] and

(4) that COPA did not employ the "least restrictive means" to effect the Government's compelling interest in protecting minors and therefore failed strict scrutiny. 322 F.3d at 251, 261-66. The lower courts erroneously found that the solitary use of filtering software in the child's own home would be less restrictive, yet a "sufficiently" effective alternative that would protect minors from adult-porn Web commerce. This is patently erroneous, for several reasons:

(a) Filters allow parents some measure of control over their own children's access to speech that parents consider inappropriate (even if not legally HTM), while their children are at home. However, minors don't access the Web *only* on computers located in the child's own home. Minors can gain access through friends, cyber-cafes, wi-fi, and public libraries and schools. In 1998, less than 10% of

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[17] The "Luhn Check Algorithm" is a cheap and instant calculation that math-checks a number to verify that it is of the type that is issued by credit card financial institutions, even though no merchant account or bank referral need be involved. Such a "Luhn Check" would prevent minors from making-up a number and trying to pass it off on a porn-site. A "Luhn Check" would screen out all but "a few of the most enterprising and disobedient young people", as noted in *Sable Communications of Cal. v. FCC*, 429 U.S. 115, 130 (1989). The propriety of the "Luhn Check Algorithm" as a defense to COPA was discussed in the BRIEF OF MEMBERS OF CONGRESS filed below in the District Court (BRIEF at pp. 32-36) and Court of Appeals on first review (at 4, 24).

libraries used filters at all.[18] In 2002, one-quarter of libraries filtered all access for minors.[19]

(b) Parents cannot supervise all the ways their children access the Web in today's world. In addition, notebook computers have become essential tools for students and are operated outside of the supervising presence of parents and can obtain wireless access to the Web, Internet, and other networks from almost anywhere.

(c) COPA is entitled to be judged on its own merits as to the protection it offers minor children across all social boundaries and in all Web traffic. It is improper to substitute a less restrictive and less effective alternative for the legislative judgment involved in the Congressional choice of remedy, since this Act can be read constitutionally. The decisions below could also be found to violate the Separation of Powers doctrine. Congress exercised its legislative power in adopting COPA, with the limitations set out in the House REPORT, as a legitimate governmental response to a grave social problem; and

(5) that COPA is substantially overbroad in placing significant burdens on Web publishers' communication of speech that may be protected as to adults and adults' ability to access such speech and, in so doing, the Act encroached upon a significant amount of protected speech beyond that which the Government could target constitutionally in preventing children's exposure to material that is obscene for minors. 322 F.3d at 251, 266-70. The courts below failed to apply existing obscenity jurisprudence from this Court's

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[18] *See* National Commission on Libraries and Information Science: *1998 National Survey of Public Library Internet Connectivity* (www.nclis.gov/statsurv/1998plo.pdf).

[19] *Public Libraries and the Internet 2002: Internet Connectivity and Networked Services* (www.ii.fsu.edu/projects/2002pli/2002.plinternet.study.pdf).

binding and applicable precedent as a constructive limitation on the reach of the Act to any such perceived protected speech, which they could and should have done to protect all such speech from any possible perceived threat. There was no reasonable basis for the Court of Appeals to conclude that COPA's: (a) definition of "material harmful to minors" impermissibly placed at risk a wide spectrum of speech that was constitutionally protected in this context; (b) definition of "minor" broadened the reach of "material that is harmful to minors" under the statute to encompass a vast array of speech that was protected for adults; (c) purported limitation of liability to persons making communications "for commercial purposes" subjected too wide a range of Web publishers to potential liability; and (d) application of "community standards" (as erroneously understood by the court) exacerbated the problem by improperly widening an unintended spectrum of speech within reach of the law; and

(6) that COPA was not "readily susceptible" to a narrowing construction, so as to save it from being overbroad. 322 F.3d at 255, 270-71. The federal courts have the absolute duty and power to authoritatively construe federal statutes, either facially or as applied to factual circumstances on a case-by-case basis, as this Court recognized even as to this Court in *Ferber, supra*.

This Court shares the duty to authoritatively construe this federal statute, if a serious doubt of constitutionality is raised and a construction of the statute is needed so any questions may be avoided. The Third Circuit has twice evaded its obligation to judicially construe COPA so as to save it. Therefore, this Court should reverse the decision of the Court of Appeals, reverse the judgment of the District Court, and vacate the Preliminary Injunction issued as having been improvidently granted, and render instead a narrowing authoritative judicial construction of COPA, consistent with its legislative purpose and Congressional intent, which furthers the policy of federal statutory

construction that federal courts should give federal legislation a saving construction in order to avoid constitutional conflicts and insure the application of the law within valid parameters.

II. COPA IS A VALID CONGRESSIONAL EXERCISE OF LEGISLATIVE POWER DIRECTED AT MITIGATING THE SEVERITY OF A *KNOWN PROBLEM* WITH RESPECT TO THE INDISCRIMINATE DISSEMINATION BY COMMERCIAL VENDORS OF "OBSCENE" WORLD WIDE WEB PORNOGRAPHY TO MINORS.

While the World Wide Web is a powerful learning tool for children, it also poses substantial dangers to young people at the hands of unscrupulous individuals. Aggressive or fraudulent "bait and switch" cyberporn marketing practices on the World Wide Web can make it impossible for children to avoid confrontation with pornographic images.

See, for example, the National Center for Missing & Exploited Children, *Online Victimization: A Report on the Nation's Youth*, www.missingkids.org/download/nc62.pdf. This was a survey of 1,501 Youths who were regular Internet users (including the World Wide Web), and was commissioned by Congress. The survey shows that teenagers are a primary vulnerable population. According to this report: (1) one in five admitted receiving an online sexual solicitation; (2) one in thirty-three admitted to an aggressive sexual solicitation -- a solicitor who asked to meet them somewhere; called them on the telephone; sent them regular mail, money, or gifts; (3) one in four admitted to an unwanted exposure to pictures of naked people or people having sex; (4) one in seventeen admitted being threatened or harassed; (5) one quarter of these young people admitted to being distressed by these incidents. It is obvious that our children and grandchildren are suffering through a serious

amount of problems and harm caused by pornographers and pedophiles in order to make use of the Internet and Web.

The deterrent value of imposing criminal sanctions on the indiscriminate dissemination of HTM to minors by commercial pornography vendors is substantial. No amount of "training" or "user based" remedies can adequately protect minors from falling prey to the surreptitious ploys of adults.

Minor children are exposed to pornography on the World Wide Web under many circumstances, such as:[20]:

1. Stealth-sites and misleading URLs: many porn-Websites intentionally mimic names of well-known companies, agencies, personalities, or brand names, in order to lure the unwary or tease a potentially broader audience.

2. Page-Jacking: the use of meta-tags (words in Website headers to attract search engines to a site) for unrelated, innocent site searches or copying the legitimate Web pages of others and adding a redirect script to draw traffic to pornsites having no relevance to the desired original site.

3. Mouse-traps: visitors are trapped in an endless pornographic maze, through the use of a software program that adds scripts to the pages containing porn ads which cause more porn ad pages to be displayed when the user clicks the browser's back or close buttons, making it impossible to leave the pornographic sites.

4. Innocent, Imprecise, and Misdirected Searches: innocent word searches on search engines lead unsuspecting users to numerous porn sites. For example, words such as

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[20] *See* www.ProtectKids.com; and House REPORT at 10-11, Senate REPORT at 2-4. *See also* CONG. REC.-SENATE, S. 12146-54 (daily ed., November 8, 1997), Sponsor's Floor Statement on COPA, by Senator Coats; and HEARING ON LEGISLATIVE PROPOSALS TO PROTECT CHILDREN FROM INAPPROPRIATE MATERIALS ON THE INTERNET ("HOUSE HEARING on COPA") House Committee on Commerce, 105th Cong., 2d Sess. (September 11, 1998).

"girls," "boys," "toys," "bambi," "doggy," and "dolls" all lead to pornographic sites.

5. Unsolicited e-mail: push-shove commercial email messages regularly contain pornography or links to pornsites on the Web ("porn-spam"), often with deceptive subject lines to trick recipients into opening the mail or containing scripts that open automatically or which display porn pictures without even clicking on a link.

6. Cyber-squatting and Porn-napping: Web domain names that are pre-registered on speculation that it can be sold or that have been "hijacked" and "held ransom" by pornographers, as domain names expire, are neglected to be renewed, or abandoned (such as sites for missing children, schools, clubs, or for former products of major companies). This problem is exacerbated and results in unintentional links to pornography, when other unsuspecting entities provide "links" to a "hijacked" URL, formerly held by a legitimate entity -- but now owned by a pornographer.[21]

III. COPA SHOULD NOT HAVE BEEN SUBJECTED TO STRICT SCRUTINY AND SHOULD BE UPHELD UNDER AN INTERMEDIATE LEVEL OF REVIEW, BUT CAN MEET EITHER LEVEL OF SCRUTINY, IN ANY EVENT.

COPA as a narrow statute, applies (1) only to pornography displayed on the World Wide Web and (2) only to communications made for commercial profit.[22] COPA "channels" (but does not "ban") commercial material (as opposed to expressive speech) to an adult audience, and is based upon a number of legitimate governmental goals. COPA should be subject to "intermediate scrutiny," under

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[21] *See also* Online Internet Institute, www.oii.org.

[22] Senate REPORT at 7-8, 10; House REPORT at 6-7, 12-13, 15-16.

the *Central Hudson* test[23] for commercial speech, and not "strict scrutiny." COPA is "viewpoint neutral," regulating dissemination of specifically defined subject matter, regardless of the identity or perceived viewpoint of the speaker, and thus, does not present the danger of "viewpoint discrimination" that might require strict scrutiny.[24]

COPA is not more extensive than necessary to serve and directly advance the many substantial governmental interests involved and may be subject to intermediate scrutiny. There is no indication that anything short of criminal penalties (under COPA) will be effective in deterring the described notorious, unprotected commercial practices of pornsites on the World Wide Web.[25]

IV. COPA IS NOT SUBSTANTIALLY OVERBROAD.

For First Amendment overbreadth, a plaintiff may assert rights of others only when a statute is facially and substantially overbroad and the improper applications of the law are not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*

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[23] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-66 (1980).

[24] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538, 554-55 (2001) (applying *Central Hudson* test to public advertising regulations). COPA regulates the placement of a commercial product for reasons unrelated to the communication of ideas. *See United States v. O'Brien*, 391 U.S. 367 (1968); *Erie v. Pap's A.M.*, 529 U.S. 277, 289-96 (2000); *Texas v. Johnson*, 491 U.S. 397, 403 (1989). The electronic blinders are only to shield its view from minor children under 17. The regulatory obligations leave many adequate and readily available "alternative avenues of communication" in and out of this medium. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

[25] For discussions of open dissemination of "free porn teasers," *see*: www.ProtectKids.com, www.ftc.gov, www.oii.org.

v. Oklahoma, 413 U.S. 601, 611-15 (1973). This is an intentionally heavy burden to establish. Plaintiffs must plead and prove the substantial overbreadth of the statute as a whole. *See Broadrick, id., and New York v. Ferber*, 458 U.S. at 769-74. *See also Watson v. Buck*, 313 U.S. 387, 400-03 (1941),[26] and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989).

The duty of federal courts to authoritatively construe federal statutes so as to save them was stated clearly in *Ferber*, 458 U. S. at 769, n. 24:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction.

The scope of COPA was carefully limited to avoid the overbreadth found in the indecency provisions of the CDA, examined in *Reno v. ACLU*.[27] As this Court noted in the instant case on the first appeal:

> First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to

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[26] Noting: "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. ... To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." In order for federal court to strike a state statute, it must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

[27] 521 U.S. 844 (1997) (holding that the Internet is like a "print" medium, upholding CDA's obscenity provisions, but striking other provisions that were interpreted to define "indecency" using "broadcast medium" standards).

> material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made "for commercial purposes." [footnote omitted] *Ibid.* And third, while the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors." *Ibid.* [28]

Based on the facts of this record, COPA does not apply to Plaintiffs. However, COPA can and should be constitutionally applied to commercial vendors of pornography, who voluntarily choose to use the World Wide Web to regularly sell that described matter and also knowingly make it available to minors.

Because Plaintiffs: (1) have failed to establish that COPA is "substantially overbroad," and (2) cannot show that COPA applies to them, Plaintiffs lack the requisite standing to request and receive injunctive relief under Article III of the Constitution. Plaintiffs have suffered no "injury-in-fact." Facts supporting Article III jurisdiction must appear "affirmatively from the record." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230 (1990). Plaintiffs' unsubstantiated "fear" is too speculative to invoke jurisdiction, as is interference with an Internet "flow" experience or a general interest in stopping enforcement of laws affecting online pornography. Plaintiffs lack the requisite "direct stake in the outcome". *Valley Forge College v. Americans United*, 454 U.S. 464, 473 (1982). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997): "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."

This lawsuit has not been brought by commercial pornographers, to whom the statute could validly apply—and constitutionally so, if the Act were evaluated as intended by

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[28] *Ashcroft v. ACLU*, 535 U.S. 564, 569-70 (2002).

Congress. Instead, Plaintiffs are entities (based upon the record) expressing non-pornographic sexual content that has never been alleged or found or accused of being "harmful to minors" as obscene or obscene for minors or otherwise falling within COPA's proper scope or legitimate reach.

The text of the operative provisions of COPA clearly demonstrates that COPA does not regulate Web sites that merely contain material that is sexual in nature. COPA narrowly and specifically applies channeling obligations only on commercial Web sites that regularly engage in the business of selling, and then knowingly make available to minors, that type of pornography that meets the *Millerized-Ginsberg* definition in Section 231(e)(6) that is obscene or obscene for minors. As such, this two-part burden of proof on the Government, like that under 18 U.S.C. § 1466,[29] would require a federal jury and the federal courts to find that an offender of COPA regularly sold pornography that was obscene or obscene for minors and then made available specific pornographic material that is obscene for minors under the definition of what is "harmful to minors". None of the Plaintiffs have pleaded or proven, or claimed or argued, that any of them has ever sold or engaged in the business of profiting from pornography meeting the proper test for obscenity or obscenity for minors. The Government has not claimed, and explicitly rejected any claim, that Plaintiffs have any such obscenity or have in any way come under the reach of COPA. Finally, the District Court did not find any of Plaintiffs' materials to be pornographic, much less even arguably within the proper scope of the statutory tests for obscenity or obscenity for minors, or that any Plaintiff has ever caused himself or itself to come within the intended and legitimate reach of the Act. Therefore, the record is devoid

[29] Congress intended COPA's 47 U.S.C. § 231(e)(2) to parallel 18 U.S.C. § 1466, as stated in S. REPT. No. 105-225, at 11, and H.R. REPT. No. 105-775, at 27.

of any factual basis for a case or controversy as to the validity of COPA as to these Plaintiffs and there is no standing shown for any Plaintiff.

By specific statutory definition, COPA does not apply to materials that have serious literary, artistic, political, or scientific value for minors, and therefore COPA cannot apply to serious or controversial treatments of sex, such as serious sex education, AIDS or STD information, disease prevention, sexual politics, news accounts of sexual offenses or legal issues, and political or social treatments of sexual issues. Properly construed, COPA cannot reach any such protected speech and Websites displaying such protected materials have no duties to exclude minors under this Act.

COPA requires that an offender know the character of the matter and then knowingly make, for commercial purposes, a communication comprised of specific, statutorily defined material. Offenders must be "engaged in the business" of trying to profit from such pornographic communications "as a regular course of such person's trade or business" under § 231(e)(2). COPA does not apply to private, governmental, news, non-profit, or other sites that do not regularly market such statutorily defined material. Properly construed, even secondary transmissions ("hot links" to offending sites), standing alone, would not violate COPA, even if "commercial." House REPORT at 25.

There has been no showing of "irreparable harm" or even "risk" of irreparable harm.[30] "Self-censorship" does not constitute irreparable harm.[31] For this reason, the

[30] Even some "risk of harm" is insufficient for the harsh remedy of a preliminary injunction. *See Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir. 1989): "[E]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'"

[31] *See Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989): "But deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized

conclusion of the District Court, repeated by the Court of Appeals,[32] that "plaintiffs could reasonably fear prosecution because their Web sites contained material 'that is sexual in nature'" is unfounded, hypothetical, and clear error.[33]

CONCLUSION

In addressing the problem of children's access to "teasers, free sexually explicit images and animated graphic images files designed to entice a user to pay a fee to browse

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the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' ... The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents."

[32] *See* 217 F.3d 162, 171.

[33] COPA only applies to subject matter meeting the 3-pronged *Millerized-Ginsberg* test, as adapted by Congress to the commercial Web-based pornography trade. Not only must the pornography depict a sexual act, contact, or lewd genital or breast exhibition, it must be obscene or obscene for minors in that it: (1) as a whole, appeals to prurient interest with respect to minors, and (2) with respect to what is offensive for minors, be patently offensive in the manner in which it represents the specific sexual conduct, and (3) lack serious literary, artistic, political, or scientific value for minors. The first two prongs, under *Miller-Smith* and Congressional intent, are to be judged by the average adult, applying contemporary standards of the American adult community as a whole with respect to what is obscene for minors, and the third prong, under *Pope*, is judged by a "reasonable person" making a universal judgment of value for the age group of probable recipient minors to which the pornography was knowingly made available by a commercial Web site that regularly sells obscenity or variable obscenity. *See* House REPORT at 28; and BRIEF OF MEMBERS OF CONGRESS to this Court on prior appeal, *Ashcroft v. ACLU*, No. 00-1293, at 4-12.

the whole" of pornography sites,[34] COPA adopts the specific requirements of the *Millerized-Ginsberg* test and is supported by *Paris Adult Theatre, 12 200-Ft. Reels, Thirty-seven Photographs, supra*, as well as *Miller, Smith, and Pope, supra*, and the legislative intent of Congress. The Act deserves to be and should now be upheld.

The "public good" is not served by enjoining a federal statute that is capable of constitutional application. The preliminary injunction, issued wrongly, thwarts the legislative authority of Congress to protect children and the manner in which carriers of communication are used to transact business affecting Interstate Commerce. The lower federal courts' balancing of interests and "potential harm" to parties was in error.

Your *amici* respectfully submit that, instead of effectuating the intent of Congress, the courts below improperly widened the "possibly invalid" reach of COPA in order to issue and uphold the preliminary injunction, and improperly gave COPA an arbitrary and expansive construction, in violation of clearly binding precedents regarding statutory construction. In direct contravention to the mandate of *Ferber*, *supra*, 458 U.S. at 769, n. 24, the lower federal courts interpreted COPA to reach potentially protected speech and, thus, made it unconstitutionally overbroad, rather than narrowly and authoritatively construing the Act within constitutional parameters under controlling precedent for "variable obscenity" and eliminating both potential overbreadth and any arguable vagueness. This Court has a duty to and should correct this error and authoritatively construe COPA as constitutionally appropriate and proper under the governing principles.

The preliminary injunction is contrary to the public interest. Without evidentiary support, it restrains a valid Act of Congress and inequitably permits the legitimate target of

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[34] *ACLU v. Reno*, 31 F.Supp.2d 473, 478 (E.D. Pa. 1999).

COPA (*i.e.* commercial pornographers) to continue to disseminate to minors material that is "harmful" because it is obscene as to minors. This raises serious social and law enforcement concerns.

COPA represents the legitimate and authoritative judgment of Congress that the power of additional criminal laws at the federal level is necessary. COPA vindicates the interest that society has in deterring and punishing anti-social commercial behaviors that harm children and which negatively affect communications channels and Interstate Commerce.

For all these reasons, the judgment of the Court of Appeals in affirming the preliminary injunction should be reversed and a narrowing authoritative construction be adopted by this Court that is binding on the lower courts in order to allow COPA to be applied in a valid and constitutional fashion as intended by the Congress.

December 10, 2003

Respectfully submitted,

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APPENDIX

TEXT OF OPERATIVE PROVISIONS OF COPA, THE CHILD ONLINE PROTECTION ACT

Title 47, United States Code.

Section 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

(a) REQUIREMENT TO RESTRICT ACCESS.—

(1) PROHIBITED CONDUCT. –Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

* * *

(c) AFFIRMATIVE DEFENSE.—

(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

* * *

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

* * *

(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

(A) COMMERCIAL PURPOSES.—A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) ENGAGED IN THE BUSINESS.—The term `engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or

knowingly solicits such material to be posted on the World Wide Web.

* * *

(6) MATERIAL THAT IS HARMFUL TO MINORS.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) MINOR.—The term `minor' means any person under 17 years of age.

CERTIFICATE OF SERVICE

Three copies of this Brief of Members of Congress as *Amici Curiae* were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, (and immediate copies sent by fax and email) on the 10th day of December, 2003, addressed to:

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3 of 3

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In the Supreme Court of the United States

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JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

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ALL PARTIES CONSENT TO THE FILING OF THIS *AMICUS* BRIEF

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE* . 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

In Criminalizing Speech That Is Appropriate for Adults, COPA Is Unconstitutionally Overbroad . . 3

A. COPA Is Substantially Overbroad Because It Restricts Information About Sexuality 7

B. COPA Is Substantially Overbroad Because It Restricts Artistic and Intellectual Expression 19

C. COPA Is Substantially Overbroad Because It Restricts Access to Materials of Educational Value to Adults 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases ***Page***

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In the Supreme Court of the United States

OCTOBER TERM, 2003
NO. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Respondents.

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

Although this Court held in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) (*Ashcroft I*), that the Child Online Protection Act of 1998 ("COPA"), 47 U.S.C. § 231, was not substantially overbroad in its reliance on "community standards," the Court did "not express any view as to whether COPA suffers from substantial overbreadth for other reasons . . . ." 535 U.S. at 585. On remand, the Court of Appeals held that respondents are likely to establish that COPA is substantially overbroad. *ACLU v. Ashcroft*, 322 F.3d 240, 266-71 (3d Cir. 2003). Because COPA restricts Internet speech available to adults to only that which Congress and prosecutors may believe is appropriate for children, *amici*[1] urge the Court to affirm the holding of the

1. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

Court of Appeals that COPA impermissibly infringes rights protected by the First Amendment and therefore is substantially overbroad.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are businesses, organizations, and individuals that use the World Wide Web to engage in speech and other forms of expression on wide-ranging subjects and who require and believe in freedom of expression in connection with their use of the Web. Some are individuals (or organizations representing individuals) for whom the World Wide Web provides an unprecedented opportunity to publish and disseminate speech on issues that they consider important. A complete list of *amici*, with descriptions of their uses of the World Wide Web, their interest in this litigation, and the impact that enforcement of COPA would have on their varying uses of the Web, is set forth in a more detailed Statement of Interest of *Amici Curiae* that is appended to this brief. *Amici's* use of the Internet illustrates COPA's substantial overbreadth. As users of the World Wide Web, *amici* are directly affected by the deterrence of speech that COPA's overbreadth causes.

SUMMARY OF ARGUMENT

COPA imposes criminal and civil penalties for any communication on the World Wide Web that includes material deemed "harmful to minors" if the communication is related to a commercial purpose. 47 U.S.C. § 231(a)(1). COPA's definition of what is "harmful to minors" is broad enough to encompass a substantial amount of material that has legitimate First Amendment value for adults, and COPA contains insufficient protections to remove that speech from its sweep. Accordingly, COPA is substantially overbroad because it cannot achieve its stated ends without simultaneously inhibiting or prohibiting constitutionally protected and socially valuable speech.

This brief illustrates COPA's overbreadth as it applies to *amici* and others like them.[2] To do so, it examines three categories of Internet speech: (1) *Sexuality information* — by threatening dissemination of speech about sex, COPA deprives adults of information about an essential element of humanity; (2) *Artistic and intellectual expression* — by subjecting artistic works to inherently subjective determinations about whether they have value for children, COPA chills creativity and culture; and (3) *Educational materials* — by creating a danger of prosecution for both the provision and receipt of pedagogical tools, COPA inhibits interactive intellectual discussion and learning.

ARGUMENT

In Criminalizing Speech That Is Appropriate for Adults, COPA Is Unconstitutionally Overbroad.

COPA, like the Communications Decency Act before it, "effectively suppresse[s] a large amount of speech that adults [have] a constitutional right to receive and to address to one another." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). A statute violates the First Amendment if

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2. To illustrate COPA's substantial overbreadth, this brief cites web pages of *amici* and others that may be endangered by the statute. For the Court's convenience, *amici* are seeking leave to lodge with the Clerk a CD-ROM that contains an electronic version of this brief in portable document format (.PDF). The citations to web pages on that disk are hyperlinked to cached copies of the cited web pages that are included on the CD-ROM. All of those web pages were cached to the disk between January 8–12, 2004, and *amici's* citations are intended to be to the versions of those web pages as they existed on those dates. It should be noted that links within these cached pages are live and, when activated, will take the reader beyond the pages stored on the CD-ROM to the Internet as it exists on the date of access (rather than on the date the cites were cached).

it proscribes more speech than is necessary to further a compelling governmental interest. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A classic example of such unconstitutional overbreadth is a law that restricts adults to only speech that is deemed fit for children. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001); *Reno*, 521 U.S. at 874; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755, 760 (1996); *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). COPA is just such a statute. Because COPA's overbreadth is both "real" and "substantial," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), COPA is unconstitutional.

Amici do not challenge Congress' asserted interest in helping parents who wish to shield their children from objectionable material on the Internet. But such an interest, even if substantial, cannot justify COPA's content-based restriction of speech for adults. COPA criminalizes (with a $50,000 fine, imprisonment for up to six months, or both) "*any* communication for commercial purposes that is available to *any* minor and that includes *any* material that is harmful to minors." 47 U.S.C. § 231 (emphasis added).[3]

In its ruling on the constitutionality of COPA, the Court of Appeals expressly considered whether the statute was substantially overbroad, and held that respondents were likely to prove that it is. 322 F.3d at 266-71. The court concluded: "the statute is substantially overbroad in that it

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3. COPA states: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both." 47 U.S.C. § 231(a)(1). The rest of Section 231(a) provides for increased fines for intentional violations and allows for civil penalties.

places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech." 322 F.3d at 266. In reaching this conclusion, the Court of Appeals relied heavily on examples submitted by the *amici* filing this brief. *See id.* at 267–68. This unconstitutional overbreadth provides an independent basis for invalidation of COPA. *See id.* at 271.

In attempting to avoid the CDA's constitutional pratfalls, Congress limited COPA's reach to material on the World Wide Web that (1) is published "for commercial purposes," and (2) meets a three-part definition of speech that is "harmful" to "minors" under 17 years of age.[4] Neither of these purported limitations saves COPA from being unconstitutionally overbroad because an enormous amount of content on the Internet falls *within* these limitations and thus potentially is subject to prosecution under COPA even though it *also* has serious value for adults.

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4. COPA states, at 47 U.S.C. § 231(e)(6):

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that —
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Amici do not believe that they publish material that anyone should deem "harmful to minors." They do believe, however, that some of their content and that of others like them may be within the reach of COPA, even though it includes material of legitimate value for adults (and, in many cases, for children too) under the First Amendment.[5] Because there is no reliable way for Web content providers

5. COPA's "commercial purposes" limitation does not exempt any of the examples used in this brief from the statute's reach. Some of the examples are from purely commercial web sites that seek to make a profit by selling goods and services (although none even approach being sites of the "commercial pornographers" that were Congress' apparent target); others rely on advertising to generate a profit or, at least, to provide financial support for the web site's activities; others seek and receive financial support through their web sites indirectly. Even though some of the *amici* are non-profit organizations that adhere strictly to guidelines under federal and state law for maintenance of that status, COPA does not provide a bright-line defense that removes from its application all such organizations as defined, for example, by the Internal Revenue Code, 26 U.S.C. § 501(c). 322 F.3d at 256 n.18. Rather, COPA's convoluted definition of the "commercial purposes" needed for liability mixes ideas about whether the publisher "devotes time, attention, or labor" to making communications, has an "objective" of making a profit "as a result of such activities," does or does not necessarily make a profit, does or does not necessarily lack other sources of income, and knowingly posts or solicits material for publication. *See* 47 U.S.C. § 231(e)(2). This definition is so unclear that *amici* have no assurance that they are not covered by it if, for example, they allow sponsorships on their web pages, share receipts from sales made by partners under linking agreements, or solicit contributions to fund their web sites — even though such activities strictly conform to the tax guidelines for non-profits. As Justice Kennedy noted in *Ashcroft I*, "The plain text of the Act . . . seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result." 535 U.S. at 600.

to distinguish between what is available to minors and what is available to adults (aside from costly screening measures that themselves deter speech and that are not appropriate for information-providing web sites),[6] the only viable option is for content providers to restrict all speech on the Web to that deemed by courts (or prosecutors) to be appropriate under COPA for minors. However, the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is *prohibited or chilled* in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (emphasis added).

This brief discusses some of that threatened material from *amici*'s own web sites and from similar sites published by others to show the wealth of Web content, far outside the realm of commercial pornography, that is within COPA's overbroad reach. In so doing, *amici* seek to provide the Court with real examples supporting the Court of Appeals' conclusion that "COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to materials that is obscene for minors." 322 F.3d at 266-67.

A. COPA Is Substantially Overbroad Because It Restricts Information About Sexuality.

The First Amendment does not protect only information that the majority of Americans like or approve. *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). Few subjects are as likely to cause discomfort as frank discussions of sex, and particularly discussions of sexual topics that are outside of the mainstream. And few subjects are as likely to raise concerns as such discussions in

6. *Amici* rely on the brief of respondents for explanation of why the Government's "blinder rack" analogy does not apply here and why COPA's designated means of screening minors from an audience impose unconstitutional restraints on free speech.

the presence of minors. Most Americans agree that it is appropriate to protect minors from material that is unsuitable for them. But COPA's restrictions on sexual speech to protect minors are likely to prevent *adults* from engaging in a large amount of Internet discourse about sexuality that is legitimate and valuable. For that reason, COPA is unconstitutionally overbroad.

To be "harmful to minors," a web communication must depict, describe, or represent a sexual act or sexual contact or must exhibit genitals or a post-pubescent female breast. 47 U.S.C. § 231(e)(6)(B). That requirement can encompass a broad range of sexual information, from basic education about procreation, to "safe sex" instructions for prevention of pregnancy or sexually-transmitted diseases, to health information about gynecological or urological issues. A wealth of such information is available on the World Wide Web.[7]

Many segments of today's society deplore the dissemination of sexual information to minors and consider any sexual practices by minors (or any unmarried persons) sinful, and thus "harmful" *per se*. *See generally* "Americans Search for New Sexual Ethic," *San Francisco Chronicle*, p. A1 (Nov. 29, 1994) (noting disapproval of teenage sex among Baptists, Buddhists, Catholics, Methodists, Mormons, Muslims, and Jews, among other religions, despite changing social mores).[8]

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7. *See, e.g.*, The Body, "Ask the Experts About Safe Sex, Prevention & Transmission," *http://www.thebody.com/Forums/AIDS/SafeSex/index.html* (answers to questions concerning safe sex practices); Salon.com, "Sex slave," *http://www.salon.com/sex/feature/2001/05/07/prostate/* (wife's account of coping with husband's sexual dysfunction following prostate surgery); The Male Genitalia Guide, "Testicular Self-Exam," *http://www.afraidtoask.com/members/testicle.html*.

8. *See also* E.K. Meister, "Sex Education Overhauled To Promote 'Abstinence Only,'" *Cincinnati Enquirer*, Mar. 29, 2001,

In this atmosphere, the threat of prosecution cannot readily be dismissed.

Two vagaries within the text of the statute heighten this threat. The first is the definition of "minors" as all persons aged 16 or younger. 47 U.S.C. § 231(e)(7). Even the Government appears to agree that providing sexual information to *some* of these minors has value. *See* Pet. Br. at 43-44. The need of American adolescents for accurate information about sex is well known.[9] But at what age is sexual information appropriate?[10] Whatever the value of providing

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http://www.enquirer.com/editions/2001/03/29/loc_sex_education.html; ChristianAnswers.net, "My Boyfriend Wants To Have Sex . . .," *http://www.christiananswers.net/q-dml/dml-y010.html*. Indeed, since 1996, Congress has conditioned sex-education funding on use of an abstinence-only curriculum. *See* Social Security Act § 531, 42 U.S.C. § 710; Rethinking Schools Online, "Federal Law Mandates 'Abstinence-Only' Sex Ed," *http://rethinkingschools.org/archive/12_04/sexmain.shtml* (including comments from *amicus* Sexuality Information and Education Council of the United States).

9. In 1999, the most recent year for which statistics are available, more than 850,000 American teenage pregnancies were completed — 30% of them by abortion. S.K. Henshaw, "U.S. Teenage Pregnancy Statistics with Comparative Statistics for Women Aged 20–24," *http://www.agi-usa.org/pubs/teen_stats.pdf*, at 3 (Alan Guttmacher Inst. 2003). Three million American teenagers acquire a sexually-transmitted disease each year. Alan Guttmacher Inst., "Facts in Brief: Teen Sex and Pregnancy," *http://www.agi-usa.org/pubs/fb_teen_sex.pdf*, at 1 (1999).

10. The Alan Guttmacher Institute, a prominent reproductive health research organization, reports: "Teenagers in the United States are more likely to have sexual intercourse before age 15 and have shorter and more sporadic sexual relationships than teenagers in Canada, France, Great

accurate sexual information to older teenagers, that value certainly is not as great for toddlers. But COPA makes it illegal to provide "harmful" material to "*any* minor." 47 U.S.C. § 231(a)(1). Accordingly, a web site has no way of knowing whether its dissemination of material to adults and older teens may be subject to prosecution because young children potentially are in the audience. The Government's answer is to disregard the younger children and rewrite the statute to exempt from liability any content that "has serious value for normal 16-year-olds." Resp. Br. at 30. But nothing in the statute supports that limitation, and web publishers are left to worry about the threat.

The level of threat varies with the local community. In *Ashcroft I*, this Court did not determine whether the "contemporary community standards" by which harmful material is judged under COPA are local or national, though members of the Court recognized that even a national standard will be applied differently by jurors in different localities. *See* 535 U.S. at 576-77 (opinion of Thomas, J.); *id.* at 586-87 (O'Connor, J., concurring); *id.* at 590-91 (Breyer, J., concurring). This is a significant problem for an international medium that has no feasible way of distributing its content to some communities but not others. As Justice Kennedy observed about COPA in *Ashcroft I*, "if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web." 535 U.S. at 596. There is no question that sexual attitudes vary throughout the United States. While state statistics on sexual activity are hard to come by, teenage pregnancy information provides a useful surrogate. In 1996, the pregnancy rate varied from a high of 26% of women aged 15–19 in Washington, D.C. and 14% of such women in Nevada to a low of 5% in parts of the Midwest. Alan Guttmacher Institute, "Teenage Pregnancy: Overall Trends and State-by-State Information," *http://www.agi-usa.org/pubs/teen_preg_stats.html* (1999). It is no secret that web information about sex is likely to meet a different reception in rural Oklahoma than it will in San Francisco.

Britain and Sweden." Alan Guttmacher Institute, "Facts in Brief: Teenagers' Sexual Reproductive Health," *http://www.agi-usa.org/pubs/fb_teens.pdf* (2002). A quarter of all U.S. teenagers have had sexual relations by age 15; half have done so by age 17. Alan Guttmacher Inst., "Facts in Brief: Teen Sex and Pregnancy," *http://www.agi-usa.org/pubs/fb_teen_sex.pdf*, at 1 (1999).

Against this background, the Court of Appeals concluded that COPA is substantially overbroad in its restriction of speech about sexual health and cited as one example of threatened material the web site of *amicus* Safer Sex Institute, *http://www.safersex.org/condoms/how.to.use/*. 322 F.3d at 268. That site includes explicit drawings and text regarding condom use, and because the drawings "exhibit . . . the genitals" they are within COPA's literal scope. Whether they are "harmful to minors" is open to debate, depending on the minor's age and the community in which they are viewed. The publisher therefore is left to wonder about (and fear) potential liability.

The Government appears to suggest that there is nothing to fear because safe-sex information is valuable for older minors. *See* Pet. Br. at 32-34, 43-44. But even assuming (despite the absence of any language in the statute to support the assumption) that *some* information about sexual health would be protected from prosecution under COPA, there are categories of such information that necessarily are more vulnerable. Consider the following:

Information about obtaining sexual pleasure. Heterosexual sex is respected in all cultures as an act of procreation. But sexual contact also is a source of intense physical pleasure. From time immemorial, men and women have explored ways to fulfill and enhance their sexual feelings — from experimentation with love potions and aphrodisiacs, to invention of new techniques and positions, to study of ana-

tomical and physiological sources of stimulation. Information regarding the importance of sexual satisfaction to healthy relationships has value for adults, as medical and other professionals frequently have acknowledged. *See, e.g.*, Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* §§ 302.71, 302.79 (1994).

The World Wide Web is a significant source of information about ways of obtaining sexual satisfaction.[11] But does

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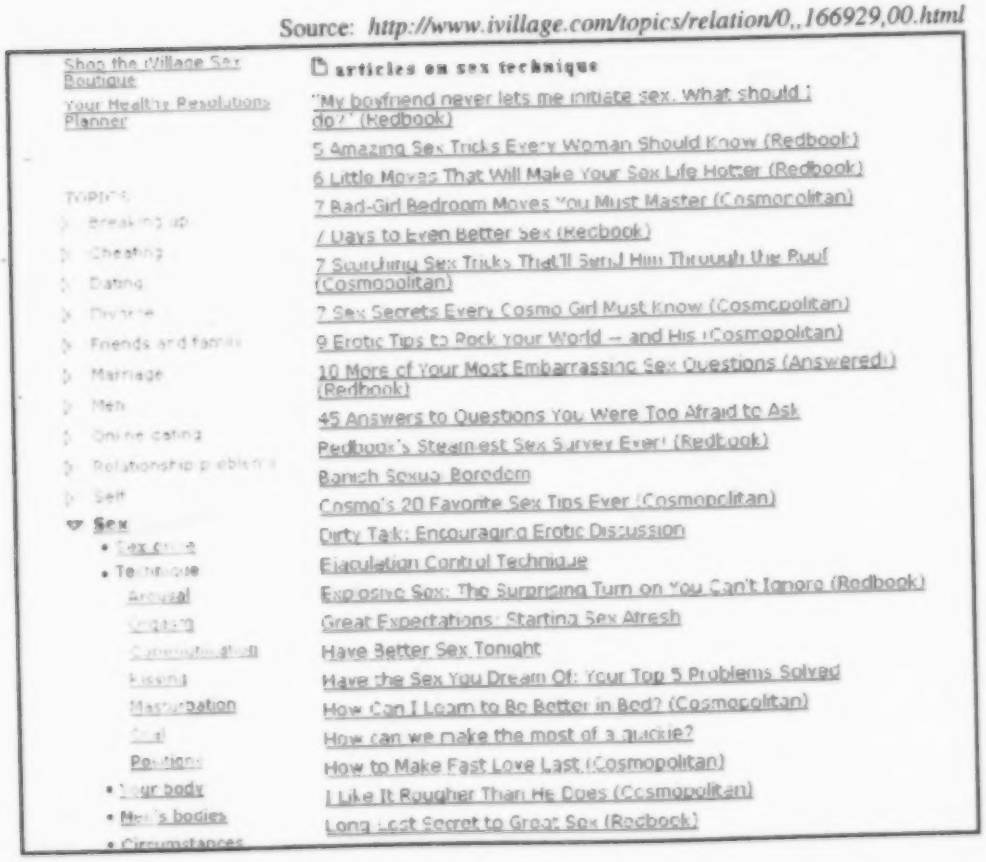
11. A single image from just one part of the index on just one web site (iVillage.com, "Relationships: Sex technique," *http://www.ivillage.com/topics/relation/0,,166929,00.html*) hints at the extraordinary range of information available:

Source: *http://www.ivillage.com/topics/relation/0,,166929,00.html*



See also, e.g., QuickCondoms.com, "Safety Girl: How To Find the G Spot," *http://www.quikcondoms.com/content.jsp?id*

such information have serious value for minors under COPA, thus allowing it to be displayed on the Internet? Any hedonistic view of sexuality is a source of moral disapproval among large segments of the American public, and transmission of such information to children therefore may be viewed by many as no better than transmission of disease. While a prosecutor might well find value for minors in instructing about how to prevent AIDS or how to do self-examinations for breast or testicular cancer, he or she may not agree on the value of instructions on how to provide pleasure to another young man or woman on date night. Even application of the "older minor" standard that the Government would read into the statute would not exclude such Internet content from COPA's reach, or remove the chill that content providers inevitably would experience when considering whether to post such content on the Internet. The web sites providing legitimate information about sexual satisfaction therefore are threatened.

Sexual devices and related topics. In *Williams v. Pryor*, the Eleventh Circuit considered the constitutionality of an Alabama statute that makes it unlawful to distribute (but not to possess or use) "any device . . . useful primarily for the stimulation of human genital organs." *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001). The court noted expert opinions that such devices are used for "standard medical and psychological purposes," including "marital and non-marital sexual relationship counseling," and it remanded to determine whether the ban unconstitutionally infringed on the rights of adults challenging the statute. 240 F.3d at 947, 955-56. On remand, the district court held that it did.

=73&ch=safety_girl; iVillage.com, "Sex Coach: Techniques for Sensational Sex," *http://www.ivillage.com/relationships/experts/sexcoach/articles/0,9632,166929_25676,00.html*; Body Positive, "Sex for People Living with HIV," *http://www.thebody.com/bp/hivsex.html* (site discussing how HIV-positive individuals can enjoy safe, pleasurable, sexual activities).

BEST AVAILABLE COPY

Williams v. Pryor, 220 F. Supp.2d 1257, 1259-60 (N.D. Ala. 2002), *appeal pending*, No. 02-16135-DD (11th Cir.).[12] As both the district court and the Eleventh Circuit acknowledged, there is a legitimate basis for providing information to adults across the nation about therapeutic sexual devices, and the First Amendment would not permit that information to be banned. But, at least in the view of the Eleventh Circuit, there is no legitimate reason for minors to have access to such devices, and under that reasoning other courts and prosecutors may well conclude that there is no serious value in providing information about such devices to minors. COPA thus would ban the information, restricting adults' access to it.

Separate from but related to the question of therapeutic sexual devices is that of sexual physical enhancements. Whether for therapy, accident reconstruction, or simple vanity, many Americans undergo procedures or treatments each year for such things as breast augmentation or penile

12. A few other states have statutes like that in Alabama. *See, e.g.*, Colo. Rev. Stat. § 18-7-101; Ga. Code Ann. § 16-12-80; Kan. Stat. Ann. § 21-4301; La. Rev. Stat. Ann. § 14:106.1; Miss. Code Ann. § 97-29-105; Tex. Penal Code Ann. § 43.21, 43.23; Va. Code Ann. § 18.2-373. Courts have been divided on their constitutionality. *See, e.g., State v. Brennan*, 772 So.2d 64 (La. 2000) (state's unqualified ban on sexual devices unconstitutional as bearing no rational relationship to a legitimate state interest); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (statute proscribing "obscene devices" impermissibly burdened right to privacy); *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (same); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985) (statute did not infringe privacy rights); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (statute valid). These disparities demonstrate that, even if there is a national community standard by which all Internet content must be measured, commercial web sites seeking to sell, advertise, or even discuss sexual devices may fall within COPA's reach.

enlargement, and the Web is full of sites about the processes. Some of those sites even contain before-and-after photos and pictorial testimonials.[13] Adults have a right to information about these procedures. As the Court said with respect to tobacco sales in *Lorillard*, 533 U.S. at 564, "it is no less true that the sale and use of tobacco products by adults is a legal activity" and therefore "[w]e must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." If, on the other hand, this information is not of serious value for minors, COPA would prevent adults from receiving it via the Internet. In *Lorillard*, the Court held that, despite the state's interest in protecting against underage tobacco use, such a result was impermissible for information about smokeless tobacco and cigars. The same must hold true for lawful medical information, whether or not of a sexual nature.

Non-traditional sexual practices. In December 2000, the Centers for Disease Control and Prevention reported that "oral sex is commonly practiced by sexually active male-female and same-gender couples of various ages, including adolescents." "What You Should Know About Oral Sex," *ftp://cdcnpin.org/Updates/oralsex.PDF*. The report warned of misconceptions regarding the practice, including the fact that many adolescents (perhaps influenced by news reports during the Monica Lewinsky controversy) "do not consider it to be sex" and "therefore they may use oral sex as an option to experience sex while still, in their minds, remaining abstinent." *Id.* The report warned further of risks of transmission of the AIDS-causing virus HIV if the practice is not followed safely. *Id. See also* "Special Report — Oral Sex Among

13. *See, e.g,* Implantforum.com, "All About Breast Augmentation: Breast Implant Before and After Photos," *http://implantforum.com/pics/pics.html*; E.D. Whitehead, "New York Phallo," *http://www.penile-enlargement-surgeon.com/presentation.html*.

Adolescents: Is It Sex or Is It Abstinence?," *Family Planning Perspectives*, Nov./Dec. 2000, at 298-304, *http://www.agi-usa.org/pubs/journals/3229800.pdf*.

Numerous web sites provide information about oral and other non-vaginal sexual conduct, including instructions and safety pointers.[14] Clearly, this is legitimate health information for many adults. Just as clearly, however, this entire subject is repulsive and anathema to others. As the Supreme Court of Georgia noted when it struck down that state's sodomy law in *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998), "many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible." States that have legalized these practices have done so only if there is consent, and this Court's declaration in *Lawrence v. Garner*, 123 S. Ct. 2472 (2003), that punishment of private sexual conduct is unconstitutional was limited to private *consensual* activity. Minors usually are presumed incapable of consent (though the age of consent varies greatly from state to state). *Compare, e.g.*, Ore. Rev. Stat. § 163.415 (age 18) *with* S.C. Const., Art. III § 3 (age 14). Accordingly, information about these practices remains a likely candidate for prosecution under COPA because it may not be deemed of value to minors. If so, adults will be proscribed from readily obtaining information to which they are entitled under the First Amendment.

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14. *See, e.g.*, QuickCondoms.com, "How to Give Oral Sex to a Man — Beginner," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=85*; Go Ask Alice!, "Oral Sex With A Condom — Does It Feel Good to the Recipient?," *http://www.goaskalice.columbia.edu/1614.html*; T. Cox, "Oral Sex: Tips for Her and Him," *http://www.ivillage.com/relationships/experts/experts_by_month/articles/0,9632,166929_92901,00.html*.

Another practice widely covered online is auto-erotic behavior.[15] There should be little doubt that many would deem such information of no value to minors. In 1994, the Surgeon General was forced to resign because she said that masturbation was "part of human sexuality and it's a part of something that perhaps should be taught" in connection with comprehensive health education.[16] Yet, there also should be little doubt that it is a topic of legitimate value. *See* Gina Kolata, *The Rule Dr. Elders Forgot: America Keeps Onan in the Closet*, *New York Times*, Dec. 18, 1994, Sec. 4, p. 5 (reporting survey findings that about 60% of adult males, 40% of adult females, 90% of teen-age boys, and 65-70% of teen-age girls had masturbated within year preceding

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15. *See, e.g.*, HIV and You, "Safer Sex: Vibrators," *http://www.hivpositive.com/f-HIVyou/4-SaferSex/4-Vibrators.html*. A. Semans, "How to Masturbate (for Women)," *http://sexuality.about.com/cs/sexualtechnique/ht/howtomasturbate.htm*. The web presents a ready source that users may consult anonymously to obtain knowledge about such a private topic. For one example of an anguished teenager's inquiry to a university web site inviting questions about health topics, *see* Go Ask Alice!, "Bed Humping = Bad Habit?," *http://www.goaskalice.columbia.edu/1720.html* ("I've had a 'bed humping' problem for almost three years now. . . . This web site seems like the only place that can help me right now. I can't talk to any of my family or friends about it. It would be too embarrassing, and I would be afraid. . . . Am I a weirdo or a pervert for doing it?").

16. *See* Center for Reproductive Law and Policy, "On the Hill: Surgeon General Resigns Under Pressure from White House," *Reproductive Freedom News*, Dec. 16., 1994, vol. III, No. 22, p. 5-6; E.C. White, "Grace Under Fire," *San Francisco Chronicle*, May 21, 1995, at M3 (interview with Dr. Joycelyn Elders). *See also* "Simi Valley Church's Program Shocks Some in Community," Associated Press, Mar. 18, 2001 (available on LEXIS; controversy caused by California church program teaching high-school-age minors about sexual topics, including masturbation).

article). If *Williams* is correct that a state has a legitimate interest in preventing auto-erotic conduct, at least by minors, 240 F.3d at 949-50, it may follow that minors can be barred from receiving information about it. That would cloak such information from adults as well.

Homosexuality. This Court is no stranger to the emotionally-charged issues relating to gay rights. Less than 20 years ago, the Court upheld Georgia's criminal sodomy law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Last Term, the Court overturned that decision and held that a Texas statute criminalizing sexual contact between members of the same sex "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Garner*, 123 S. Ct. 2472, 2484 (2003). News accounts following the *Lawrence* decision (and the debate about gay marriage that has followed in its wake) make clear that the public remains divided on this issue. *See, e.g.*, K.Q. Seelye & J. Elder, "Strong Support Is Found for Ban on Gay Marriage," *New York Times*, Dec. 21, 2003, at 1. Justice Scalia's discussion in his dissent in *Romer v. Evans*, 517 U.S. 620, 644-48, 652 (1996), of a "culture war" between "those who wish to retain social disapprobation of homosexuality" and those who do not remains an apt description of the divide in American society.

Despite this Court's holding in *Lawrence* that the Government may not criminalize or otherwise intrude upon private, consensual sexual activity between adults, it is unlikely that information on the Web about homosexual practices and lifestyles would be viewed uniformly as having serious value for minors. To the contrary, such content is fertile ground for attack. COPA gives those disapproving such conduct among minors, including prosecutors, the tools to criminalize such disapproved speech.

The World Wide Web contains a large amount of information about homosexual practices.[17] To the extent that this information is not already in danger under COPA because it deals with non-traditional sexual conduct such as sodomy, the fact that it relates to same-gender relationships is bound to cause many to label it unsuitable for minors. If such information is prohibited on the Web under COPA, adults also would be prevented from obtaining material that, as recognized in *Lawrence*, has social value for many adults.

B. COPA Is Substantially Overbroad Because It Restricts Artistic and Intellectual Expression.

The overbreadth of COPA threatens more than the dissemination of *information*, as in the examples just discussed. Its chilling effect is acutely felt among those who wish to use the Web for artistic or intellectual *expression*. COPA's "harmful-to-minors" test cannot offset this chill, for it utilizes an inquiry that is fundamentally subjective, and therefore flawed in its attempt to distinguish content that may be appropriate for minors from that which may be appropriate for adults. This is especially evident when evaluating whether any given example of expression possesses serious literary or artistic value for minors as opposed to adults.

Perhaps the best illustration of COPA's unconstitutional overbreadth is the posting of visual art on the Internet. Museum web sites provide information about their exhibits and also display actual works of art online. These museums, like many other content providers, have no cost-effective, reliable means of distinguishing adults from minors among their audience, and thus are reduced under COPA to censoring all of their posted artwork accordingly to a standard

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17. *See, e.g.*, The Body, *http://www.thebody.com* (AIDS and HIV information site); Mogenic, *http://www.mogenic.com/* (site providing columns, advice, forum for gay and lesbian individuals); Stop AIDS Project, "Oral Sex — Is It Safe?," *http://www.gay.com/*.

that permits only works deemed of serious value to minors, without regard to whether works failing that test still have serious value for adults. As the degree of subjectivity applicable to such evaluations of "serious value" increases, this overbreadth problem is magnified.

Online exhibits of the nude photography of Robert Mapplethorpe exemplify this point. Mapplethorpe's works have received both acclaim and extreme approbation, and an exhibit of his works on the web site of *amicus* California Museum of Photography at The University of California, Riverside (UCR) was a topic of discussion by both the district court and this Court in *Reno*.[18] The district court in *Reno* observed

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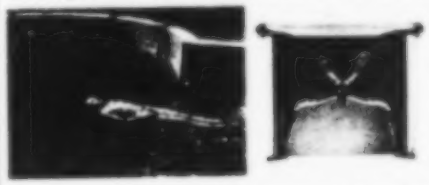
18. A picture of a UCR web page comparing the works of Weston and Mapplethorpe (which is still on the Web today, *http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*) was featured in briefs submitted to the district court and this Court in *Reno* by *amici* that included UCR:

Source: http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html

A comparison of *Weston's Nude Floating*, 1939 and Mapplethorpe's *Thomas*, 1986, provides one example of the shift in context presented by this exhibition.



Weston's *Nude Floating*, 1939, an image of a woman floating face up in a swimming pool, with Mapplethorpe's *Thomas*, 1986, an image of a nude man tautly posed in a square structure. Here, the modern, formal analysis usually applied to Weston's work expands to embrace postmodern themes rooted in societal relationships, gender, race, and sexuality. Likewise, Mapplethorpe's work examined next to Weston's invites the viewer to look beyond the lingering NEA controversy and see the image for its formal complexities in the tradition of modernist photography. In both cases the comparisons serve to more firmly ground the artists' work in 20th century art practice.

CAPTIONS:
Edward Weston, *Nude Floating*, 1939, Special Collections, UC/Santa Cruz.
Robert Mapplethorpe, *Thomas*, 1986, Robert Mapplethorpe Foundation. © 1986, Estate of Robert Mapplethorpe. Used by permission.

Other examples of Mapplethorpe's work that are posted on UCR's web site include: *Lisa Marie, http://www.photography.net/assets/duplicate1/maple003_Hnew.jpg*; *Lydia Cheng, http://www.photography.net/assets/duplicate1/maple004_Hnew.jpg*; and *Sonia Resika, http://photography.net/assets/duplicate1/maple005_Hnew.jpg*.

that the government had *conceded* that Mapplethorpe's photographs "would be patently offensive in some counties." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996). This Court, in a part of its opinion quoting findings of the district court, stated —

> when the UCR/California Museum of Photography posts to its Website nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore and New York City, but also in Cincinnati, Mobile, and Beijing — wherever Internet users live.

521 U.S. at 854, quoting 929 F. Supp. at 844. This observation is equally pertinent to COPA, which includes within its scope all content "available to any minor." The Court of Appeals cited to the UCR web site in concluding that COPA threatens material such as that posted on the site. 322 F.3d at 267. Thus, despite all the efforts Congress devoted to making COPA narrower than the CDA, this artistic content, threatened before, remains threatened.

The Court of Appeals also relied on the Getty Museum's posting of *Woman with Meat Packer's Gloves* — described online by the museum as a "disturbing image of a [naked] woman piercing her own breast and abdomen with the sharp tips of meat packer's gloves" — as an example of web content that has serious artistic value for adults but not for minors when viewed as a single web page on the Internet. 322 F.3d at 267 n.35; *see* Getty Museum Collections, Paul Outerbridge, *Woman with Meat Packer's Gloves, http://www.getty.edu/art/collections/objects/o62648.html*. Ultimately, however, the Court of Appeals concluded that the image would have serious artistic value for minors when viewed in the context of the entire museum's collection, so as to remove it from COPA's reach. 322 F.3d at 267 n.35. Eager to reduce

COPA's scope so as to save its constitutionality, the Government agrees. Pet. Br. at 43-44. But that result is far from obvious, particularly with respect to 10- or 12-year-old minors who regularly are among Internet users. COPA would subject such art to standards befitting children rather than adults.

Woman with Meat Packer's Gloves

Paul Outerbridge
American, 1937
Three-color carbro print
Image: 15 5/8 x 9 3/4 in.
87.XM.66.2

Despite my considerable experience in the field of photography, I was for a long time unsure whether I would ever succeed in producing a good carbro print. Many of these pictures were produced with considerable technical difficulties unknown to today's users of more recent and much simpler color materials. Each shot cost $150, and many hours of work were necessary to produce it. Three different shots with varying exposures had to be made with three different color filters. After this, three separate

Source: *http://www.getty.edu/art/collections/objects/o62648.html*

The truth is that works of art often are provocative, which to many means that they are offensive and without value. *See generally National Endowment for the Arts v. Finley*, 524 U.S. 569, 574-75 (1998) (discussing works of Mapplethorpe and Andres Serrano). Disputes about the merit of artistic expression occur frequently in our country, such as when the Museum of International Folk Art, a branch of Santa Fe's Museum of New Mexico, displayed an artistic depiction of Our Lady of Guadalupe, the popular Hispanic image of the Virgin Mary. *See Santa Fe Madonna Sparks Firestorm*, Art in America, Jun. 1, 2001, No. 6, Vol. 89, p. 23. The image, by California artist Alma Lopez, was a computerized photo collage of the Virgin wearing a bikini of roses and held aloft by a buxom, bare-breasted angel. It is now posted by her on the Web (*Our Lady*, *http://www.almalopez.net/*). While Lopez based the image on her feminist Hispanic background and considered it reverential, Santa Fe residents responded with threats of censorship and the show's curator was accused of promoting "cyber porn." *Id.*

Controversies such as these prove that the subjectivity of artistic expression makes it fertile ground for a statute that requires courts to distinguish as a matter of law between content of value to minors and content of value to adults. There is much art already on the Web, including but not limited to photographic art, available on museum web sites and potentially within COPA's scope.[19] COPA's overbreadth endangers the availability of these works to adults and may ensure that additional works of artistic value to adults will never become available on the Web in the future.

Private art galleries face the same problem. Indeed, because art galleries tend to exhibit newer original works not yet vetted by the art world or accepted as at the level of inclusion in museum collections (and because they often display just single exhibitions rather than large museum-like displays) their problem may be heightened. For example, a Philadelphia art gallery that posts for sale a variety of nudes might reasonably be construed as satisfying COPA's definition of what is "harmful to minors," yet have serious artistic value for adults.[20] Art galleries abound on the Web, and examples of content that is of serious value to adult collectors yet might be deemed "harmful to minors" are not difficult to

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19. *See, e.g.*, Metropolitan Museum of Art, *Study of a Nude Man*, *http://www.metmuseum.org/collections/view1.asp?dep=11&item=52%2E71*; *Id.*, *Two Nudes Standing*, *http://www.metmuseum.org/collections/view1.asp?dep=19&full=1&item=1997%2E382%2E46*; UCR, California Museum of Photography, "Continuous Replay: The Photographs of Arnie Zane," *http://www.cmp.ucr.edu/photography/zane/default.html*; *id.*, *The Torsos*, *http://www.cmp.ucr.edu/photography/zane/torsos.html*; Guggenheim Museum of Modern Art, *Nude*, *http://www.guggenheimcollection.org/site/artist_work_lg_110_2.html*.

20. *See, e.g.*, More Gallery, Nelson Shanks, *Squeaky's Beads*, *http://www.moregallery.com/GifWrap1.asp?RecordNumber=549*.

find.[21] Moreover, although some (but clearly not all) of this art may not be intended by the content providers to appeal to the prurient interest, it should be beyond question that at least some materials that would not be viewed as erotic by adults nevertheless would appeal to the prurient interests of minors (the culturally classic example of National Geographic photographs may come to mind). According to COPA, so long as unshielded speech — including visual and artistic expression — lacks serious value to minors, it has no constitutional protection for adults on the Internet.

The First Amendment does not tolerate banning non-obscene art works from adult viewers merely because such works could be deemed harmful to minors. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 389 (1988). But COPA subjects art exhibited on the World Wide Web to precisely that damage. In this sense, COPA is just as overbroad, and just as chilling to freedom of expression, as was the CDA, despite Congress' efforts to narrow the statute's reach.

The *American Booksellers* decision illustrates the potential harm posed by COPA to *amici* like the Authors Guild and the American Society of Journalists and Authors. Many of the controversial literary works at issue in that case are on

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21. *See, e.g.*, the nudes of Edward Weston (*Nude, New Mexico, 1937, http://www.edward-weston.com/nudes/nude_new_mexico.html; Nude, 1936, http://www.edward-weston.com/nudes/nude_219n.html; Nude, 1927, http://www.edward-weston.com/nudes/nude_7n.html*); Tomasz Rut, *Tesoro, http://www.rutfineart.com/art/Tesoro.htm*; Motley Focus Locus, John F. Archer, Collograph Plates, *http://www.motley-focus.com/collograph.html*; *id.*, Shelley Feinerman, *The Princess and the Frog* (self portrait), *http://www.motley-focus.com/frogprincess.html*; and the untitled works of Pennsylvania artist Scott Church ("Welcome to My Daydream," *http://users.nbn.net/~schurch/*; The Art of Scott Church, *http://users2.nbn.net/~schurch/images/torso1.jpg*; *id.*, *http://users2.nbn.net/~schurch/images/hnc.jpg*); *id.*, *http://users.nbn.net/~schurch/outstudio.html*).

the Web.[22] These *amici* represent thousands of writers, any number of whom may want or need at some point to place their writings — essays, articles, poetry, short stories, and more — on the Web as well. The federal courts in *American Booksellers* were uncertain and divided as to whether James Joyce's *Ulysses* — a novel of recognized literary value to adults — was "harmful to minors." It therefore certainly is reasonable for other authors (and especially those not yet as widely received and studied as is Joyce) to feel uncertain about whether their own literary works might be viewed by some prosecutor or court as lacking in literary or artistic value for minors and therefore deemed in violation of this criminal statute. The only safe response to such reasonable concern is self-censorship, and the result is that the Web would then never see an inestimable amount of literary creations. Such a result would affect not only the authors, but also adult Web users who would be the poorer for the inevitable limitation of literary works available in this medium.

The multi-media nature of the Web, which transmits textual, graphic, audio, and visual material, enables artistic expression not readily reducible to print form to be fully available to both adults and minors. Music is a popular

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22. *See Commonwealth v. American Booksellers Assn.*, 236 Va. 168, 174-75, 372 S.E.2d 618, 622 (1988) (listing works at issue). In some cases, the works now on the Web are newer editions, or at least excerpts from the works. Examples include: R. Bell, *Changing Bodies, Changing Lives* (3d ed. 1998), *http://www.ourbodiesourselves.org/cbcl.htm* (excerpts); J. Collins, *Hollywood Wives: The New Generation* (2001), *http://www.jackiecollins.com/hollywood_wives_new_excerpt.html#excerpt* (excerpts); S. Donaldson, *Lord Foul's Bane* (1977), *http://netserver.massmedia.com/~mikeb/booktour/lord_fouls_bane.htm*; J. Joyce, *Ulysses* (1961), *http://www.bibliomania.com/0/0/29/61/frameset.html*; *Our Bodies Ourselves for the New Century* (1998), *http://www.ourbodiesourselves.org/excerpts.htm* (excerpts).

example. Popular and critically acclaimed songs are available on the Internet not only in text form (lyrics), but also in audio and video streams. The musical styles range from classical to rap, and the words range from staid to graphic.[23] Once posted, this music is available to adults and minors without distinction. Often, it is controversial. In 2003, an Emory University study published in the *American Journal of Public Health* reported on a possible link between rap music and videos, which often contain explicit sexual lyrics, and risky sexual behavior among African-American adolescent girls. *See* Emory Health Sciences Press Release, "Adolescents with High Exposure to Rap Music Videos Exhibit Higher Levels of Risky Health Behaviors," Feb. 28, 2003, *http://www.emory.edu/WHSC/HSNEWS/releases/feb03/rap.html*. Whether courts ultimately will determine that such expression lacks "serious . . . artistic . . . value for minors" cannot be answered neatly and with certainty by content providers, again illustrating that COPA unconstitutionally reduces content on the Web to only that deemed fit for children.

C. COPA Is Substantially Overbroad Because It Restricts Access to Materials of Educational Value to Adults.

The widespread use of the World Wide Web by educational institutions presents another example of the tension between online expression and the resulting overbreadth of

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23. *See, e.g.*, Public Enemy, *http://www.publicenemy.com/index.php?page=page5* (lyrics to songs by hit music group); Limp Bizkit Fan Site, *http://www.geocities.com/ResearchTriangle/Node/7156/sites/limpbizkit.html* (fan site with lyrics); Eminem, *http://www.eminem.com/* (providing Grammy-award winning music of artist Eminem); 50 Cent Online, 50 Cent, *In Da Club*, *http://www.50centonline.com/5.php* (Grammy-award nominated lyrics of artist 50 Cent); Lyrics On Demand, "Lil' John Lyrics: Get Low Lyrics," *http://www.lyricsondemand.com/l/liljonlyrics/getlowlyrics.html*.

COPA. The statute fails to acknowledge, let alone constitutionally reconcile, this tension, since "educational" value is not even listed in Section 231(e)(6)(C).

Recognizing the power of the Internet to transmit ideas, educational institutions have established a significant presence on the Web. Education and intellectual pursuit through those web sites perhaps best evidences the dual aspect of COPA's overbreadth that is at play here: the statute restricts not only content providers but also content seekers. As content providers, professors post course materials, and college and graduate students post academic work product, on the Web. But where the Web truly shines is in its ability to make a mind-boggling array of information and expression readily available to students in a wide variety of academic disciplines. Students of anything from abnormal psychology to sociology, gender studies to literature, photography to anthropology, and of course human sexuality, may plumb the Web for knowledge, ideas, and understanding of their own studies and of the wider world around them. As an essential part of the human experience, sexuality will inevitably be part of that process, sometimes in ways that some may believe appeal to prurient interests and lack serious value, at least for minors. It is axiomatic that, in narrowing content available on the Web to that which is not "harmful to minors," much that is valuable for adults would be lost. This result of COPA's overbreadth is the antithesis of the marketplace of ideas that the Web has come to exemplify.

An example of how educators use the Web to this dual purpose is provided by *amicus* Peter Ludlow, a Professor in the Department of Philosophy and the Department of Linguistics at the University of Michigan, who places online the course materials for his "Conceptual Issues in Cyberspace" and "Moral Reasoning" classes. *See, e.g.*, P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://www-personal.umich.edu/~ludlow/highnoon.html*. The courses cover such issues as the nature of online sexual behavior in multi-user online games and application

of moral reasoning concepts to ethical dilemmas that arise in cyberspace. They include discussions of censorship on the Web — with sites threatened under COPA among the course materials. These items, intended for use by young adults in the university setting and of serious value to them academically, would be equally available to minors on the Internet.

The same is true of a course entitled "Sex and Gender in Pre-Modern Europe," offered in the History Department of the University of North Florida. The class web site for the 'Sex and Gender" history course states that the class syllabus, outline, and other handouts also have been made available on the Web precisely because "[t]he Internet is now a valuable research tool for students."[24] Required class readings include "primary documents available on the World Wide Web," and the site includes hyperlinks to those documents in full text. These linked documents include discussions of homosexuality by ancient Romans; classical descriptions of lesbianism; and an account of the gay subculture in early eighteenth-century London.[25] Under COPA's "harmful to minors" definition, the potential that these texts and images are subject to criminal prosecution is real, and the resulting uncertainty would be sufficient to chill this Web-based speech that has serious academic value for

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24. *See* University of North Florida, "Sex and Gender in Pre-Modern Europe," *http://www.unf.edu/classes/sexgender/* (class web site).

25. *See id.* (fn. 24, *supra*), linking to: Seneca, "Natural Questions" (excerpt), *http://www.fordham.edu/halsall/pwh/seneca-nq1-16.html*; Lucian, *Dialogues of the Courtesans*, "Leaena and Clonarium," *http://www.fordham.edu/halsall/pwh/lucian-court.html*; Rictor Norton, *Gay History & Literature*, "The Gay Subculture in Early Eighteenth-Century London," *http://www.infopt.demon.co.uk/molly2.htm*.

adults.[26] This threat again demonstrates that COPA is unconstitutionally overbroad.

CONCLUSION

The Government takes the Court of Appeals to task for identifying in its opinion "only" three examples of communications with serious value for adults that may be covered by COPA. Pet. Br. at 43. The Government does not say precisely how many examples it would require before conceding that COPA is so broad that it substantially encroaches on speech that is constitutionally protected for adults. Because the Internet is so vast, no court could fully catalogue all such speech. The several dozen examples set forth in this brief are but the tip of the iceberg, and that iceberg is growing and changing every day as the Internet continues to expand and to influence the way Americans communicate with each other and the rest of the world.

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26. For another example of an extensive collection of materials compiled for a course of study, *see* Grinnell College, "Unit 1," *http://web.grinnell.edu/courses/soc/s03/soc260-01/Unit1.html* (course materials for "Sociology 260 – Human Sexuality"). Additional examples include: Harvard University, "Lecture 11: Sexuality and Orgasm," *http://www.courses.fas.harvard.edu/~anth138/slides/lecture11/lecture11.htm* (lecture in course entitled, "The Behavioral Biology of Women," Anthropology 128, offered Fall 2003); *id.*, *http://www.courses.fas.harvard.edu/~anth138/slides/lecture11/Slide28.gif*; University of Virginia, "Gender Violence and Society," *http://toolkit.itc.virginia.edu/cgi-local/tk/UVa_CLAS_2004_Spring_SWAG203-1/displaymaterials:Moraga.Giving-Up-the-Ghost-Pt2.pdf?*; Rochester Institute of Technology, The School of Photographic Arts and Sciences, 1999 Student Honors Show, *http://www.rit.edu/~661www/student_work/honors_show_99/34.html*; Muhlenberg College, Art Department student work, *http://www.muhlenberg.edu/depts/art/Students/2000/Shira%20Helstrom.html*; University of Maryland, Student Photography Gallery, *http://student.btyroler.com/gallery/summer2002/*.

COPA's breadth far exceeds that which is necessary to accomplish any legitimate objective of Congress. It therefore is substantially overbroad and violates rights of free expression under the First Amendment. For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the Court of Appeals for the Third Circuit that preliminarily enjoined enforcement of the Child Online Protection Act, and to hold that COPA is unconstitutional.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Society of Journalists and Authors** is a national organization of leading independent writers of non-fiction. Many of the members write on sexuality, science, medical, and marital issues. Some write directly for the World Wide Web; others write for the print media. In both cases, the works often are placed on the web. The Society and its members are concerned that COPA will prohibit its members' writings from being placed on the Web and will chill free expression online.

The **Authors Guild, Inc.** is a national association of more than 8,400 professional book and periodical writers of all genres, including journalists, historians, biographers, and other writers of fiction and nonfiction. Founded in 1912, it is the oldest and largest organization of published writers in the United States. Members of the Authors Guild include winners of the Pulitzer and Nobel Prizes, PEN/Faulkner and National Book Awards, Caldecott and Newbery Medals, MacArthur and Guggenheim Fellowships, and numerous other prestigious awards and prizes in literature and entertainment. The Authors Guild works to promote the professional interests of its members and to educate the community at large on issues facing publishing-related industries.

One of the Authors Guild's principal purposes is to express its members' views in cases involving questions of freedom of expression and to support that fundamental constitutional right. Many of its members rely heavily on the extraordinary opportunity for free and open communication offered by the World Wide Web, which allows its members to participate in a true "marketplace of ideas." The Authors Guild opposes COPA because it will chill free speech in this important forum.

Since 1993, the **California Museum of Photography at the University of California, Riverside** ("UCR/CMP") has been producing exhibitions on the Internet that combine both fine art and scholarship. The Museum promotes understanding of photography and related media

through collection, research, exhibition, and instruction, and is vitally concerned with the intersection of photography, new imaging media, and society. The Museum provides a supportive and challenging environment that stimulates discourse about issues relevant to the lives and interests of artists, scholars, and the general public. *See generally* UCR/CMP Information, *http://www.cmp.ucr.edu/photo/info.html#sheet/*.

The Museum is concerned that such online exhibits as a comparison of the work of photographers Edward Weston and Robert Mapplethorpe (*see http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*), Lucien Clergue's Nudes (*see http://www.cmp.ucr.edu/exhibitions/signs/*), and Robin Rosenweig's Three Bodies (*see http://www.cmp.ucr.edu/photography/bodies/*) may be restricted by COPA. The Museum has long championed use of the Internet as an expressive medium for both individual artists and for collaborative activities. Provisions in COPA could prohibit advanced scholarship in the visual arts, as well as practice by contemporary artists exploring the unique attributes of the Internet as a medium for pictorial discourse and active collaboration across state and international boundaries.

UCR/CMP hosts a Museum Store on its website and has joined the world's largest online bookstore, Amazon.com, to offer a comprehensive collection of fine art books, CDs, and videos through a link from its online Museum Store. Part of every purchase made through the Amazon.com link in the Museum Store is used to benefit the Museum. *See* UCR/CMP Museum Store, *http://www.cmp.ucr.edu/books/*. The store offers such books as *The Garden of Earthly Delights: Photographs by Edward Weston and Robert Mapplethorpe*, a scholarly catalog which centers on common themes investigated by Mapplethorpe and Weston and examines the contrasts and parallels among their still lifes, nudes, and portraits. UCR/CMP is concerned that making such scholarly works available to the public may be restricted by COPA.

Dr. Peter Ludlow is a Professor in the Department of Philosophy and Department of Linguistics at the University of Michigan and a consultant to information technology executives on Internet activities. He believes that materials that he uses to teach his classes and to consult, some of which now are also included in published books, may be within the scope of COPA. Professor Ludlow's practice is to place all of his course materials for his classes on his home page for access by his students, and he also places online materials that he uses in his consulting activity. Professor Ludlow provides links on his web site to publishers of his books. Professor Ludlow views COPA as directly targeting his ability both to teach and to consult and is concerned that his site may be considered commercial under COPA.

Among the classes taught by Professor Ludlow is a course entitled "Conceptual Issues in Cyberspace," which covers, in the online context, such philosophical issues as the nature of self and community. Professor Ludlow believes that COPA may prohibit him from placing on his site course materials relating to the nature of online sexual behavior in MUDs (multi-user interactive games played over the Internet) and other materials that are essential to the course but that may be termed "harmful to minors."

Professor Ludlow has also offered, and plans again in the future to offer, a course entitled "Moral Reasoning," which would apply traditional concepts in moral reasoning to the ethical dilemmas that arise in cyberspace. The class syllabus has included discussions of censorship on the Internet and COPA itself. Professor Ludlow believes he cannot comprehensively or meaningfully teach these issues without giving examples of communications that might be "harmful to minors" under COPA but which nevertheless are worthwhile communications, and that he cannot do so without violating COPA himself. Professor Ludlow has made available on his class web site most of the materials for the course, but believes he would be unable under COPA to provide online copies of the more controversial materials.

Safer Sex Institute ("SSI") is an unincorporated association for which Safersex.org is the service mark. Safersex.org is the oldest safer sex educational site on the Internet. The site has been repeatedly named as one of the "best of the net" Web sites and is mentioned in numerous CD-ROMs, college textbooks, and other popular books concerning sexuality and health on the Internet. Over 80,000 people per month examine the Web site. The information on the site includes discussions of sexual organs, sexually transmitted diseases, and other issues related to sexuality that could be considered "harmful to minors" according to particular community standards. *See* SaferSex.org, *www.safersex.org*.

The **Sexuality Information and Education Council of the United States (SIECUS)** is a national nonprofit organization incorporated in 1964 that develops, collects, disseminates, and promotes comprehensive information about sexuality, and advocates the rights of individuals to make responsible sexual choices. *See* SIECUS, *http://www.siecus.org/*. It believes that sexually explicit speech and visual materials are indispensable elements of sexuality education, and that COPA may restrict the appropriate professional use of such materials by sexuality educators, therapists, and researchers. *See id*.

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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General of the United States,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CENTER FOR DEMOCRACY AND TECHNOLOGY; COMIC BOOK LEGAL DEFENSE FUND; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; FREEDOM TO READ FOUNDATION; INTERNET ALLIANCE; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS; NEWSPAPER ASSOCIATION OF AMERICA; PUBLISHERS MARKETING ASSOCIATION; RECORDING INDUSTRY ASSOCIATION OF AMERICA; AND SOCIETY FOR PROFESSIONAL JOURNALISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION AND INTEREST OF THE AMICI	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	6
I. THE CONSTITUTIONAL STANDARDS APPLIED IN *ACLU v. RENO* TO STRIKE DOWN THE CDA ARE EQUALLY APPLICABLE HERE, AND REQUIRE THAT COPA BE INVALIDATED AS WELL	6
A. The Constitutional Flaws This Court Found in the CDA Are Not Remedied by COPA	7
1. COPA's "commercial purposes" requirement unconstitutionally burdens a substantial amount of both commercial and noncommercial speech	8
2. The revised definition of "harmful to minors" still will result in suppressing protected speech	11

Contents

Page

3. Limiting COPA to the World Wide Web does not eliminate the interference with the First Amendment rights of adults 13

4. The affirmative defenses do not cure COPA's defects 14

II. COPA FAILS STRICT SCRUTINY BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S OBJECTIVES ... 22

CONCLUSION 28

APPENDIX: *THE AMICI* 1a

TABLE OF CITED AUTHORITIES

Page

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Page

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Page

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Smith v. People of the State of California, 361 U.S. 147 (1959) 9

Speiser v. Randall, 357 U.S. 513 (1958) 19

United States v. American Library Ass'n, 123 S. Ct. 2297 (2003) 27

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Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 12

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

Fourteenth Amendment 18

Cited Authorities

Page

STATUTES

47 U.S.C. § 231 (Supp. V. 1999) ..... *passim*

Pub. L. No. 105-277, Div. C, § § 1401-1406, 112 Stat. 2681-736 to 2681-741 ..... *passim*

Pub. L. No. 104-104, § 502, 110 Stat. 103 ..... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 105-775 (1998) 22

COPA COMMISSION, FINAL REPORT OF THE COPA COMMISSION (2000) 23, 25

NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET (2002) 23, 26

INTRODUCTION AND INTEREST OF THE AMICI[1]

This brief *amici curiae* is submitted on behalf of a spectrum of media content providers, computer software and technology businesses, trade associations, and public interest organizations that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication suitable for both children and adults. *Amici* variously constitute and represent:

- writers, publishers, editors, and distributors of textual, audio, and audio-visual material ranging from books, magazines, newspapers, newsletters, and comic books to sound recordings;

- educators and librarians whose students and patrons desire access to the widest possible range of informative material;

- Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it;

- software developers and technology concerns who, responding to the market's demands, have been developing ever more effective means for parents to protect minors from exposure to age-inappropriate materials; and

1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* disclose that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained the written consents of the parties to the filing of this brief, and such consents are being lodged herewith.

- public interest organizations reflecting parental and community concerns that possibly well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.[2]

Amici are deeply concerned about Congress' latest attempt to censor what this Court has recognized to be a "dynamic, multifaceted category of communication" – the Internet – by transforming it into a child-proof medium whose "level of discourse" would be reduced to that "suitable for a sandbox." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it"). The First Amendment does not allow such sanitizing of public discourse, however well intentioned.

None of *amici's* constituents are engaged in the business of commercial pornography, yet *amici* appear here because they fear the speech with sexual content that they produce, distribute, use as teaching aids, and otherwise provide access to via the World Wide Web stands at risk of challenge under the Child Online Protection Act, Pub. L. No. 105-277, Div. C, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (codified at 47 U.S.C. § 231 (Supp. V. 1999)) ("COPA"). This fear is hardly idle, as COPA applies on its face to any Web site that, in the regular course of business, communicates *any* material that is harmful to minors – including written materials that do not constitute commercial pornography. 47 U.S.C. § 231(a)(1)-(3); 47 U.S.C. § 231(e)(2)(B). *See American Civil Liberties Union v. Reno*, 31 F. Supp. 2d

2. *Amici* are more fully described in the appendix.

473, 480 (E.D. Pa. 1999) ("*COPA I*") (COPA "imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that includes any material that is harmful to minors'"). Thus, the government's contention that "COPA's principal effect is to require commercial pornographers to place their pornographic teasers behind [adult verification] screens," Brief for the Petitioner ("Pet. Br.") at 25, finds no support in the law itself and affords no protection to *amici*'s constituents. As the district court observed, "[t]here is nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers only." *COPA I*, 31 F. Supp. 2d at 480.

It is far from inconceivable, for example, that a prosecutor could rely on COPA in attempting to suppress mainstream Web sites, such as the following:

- A publisher's Web site that makes available excerpts from a romance novel that contain graphic sexual content and photographs of male genitalia from a fine art photography book;
- An online bookstore's Web site that contains quotations from books in its catalogue, including from textbooks concerning human sexuality;
- An online library's Web site that allows users to "check out" and read books about human sexuality;
- A record company's Web site that includes clips of songs or videos containing sexually-explicit material;
- A Web site for fans of a musician or author that offers a message board or chat room where sexually-explicit messages have been posted;

- An online dictionary that includes definitions of various sexual practices;

- Search engines that provide hyperlinks to Web sites that include graphic sexual content; and

- A newspaper's Web site that provides hyperlinks to Web sites that include graphic sexual content.

COPA fails to remedy the constitutional flaws of the Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 103 ("*CDA*"), Congress' first effort to regulate speech on the Internet, which was struck down by this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997) ("*ACLU*"). The CDA criminalized speech over the Internet that was "patently offensive" or "indecent" for minors. In the ensuing legal challenge, first a three-judge panel of the Eastern District of Pennsylvania, and then this Court, reasoned that the burden imposed by the CDA on adult speech was unacceptable because, *inter alia*, the technological means proposed by the CDA for screening unsuitable materials from minors while, at the same time, not unduly burdening adult speech were, in combination, ineffective and unproven. (These proposed screening mechanisms were presented in the CDA as affirmative defenses.) At the same time, the Court found that a less restrictive means of accomplishing the statute's objectives – user-driven technology that gives parents greater ability to regulate their children's access to material they believe is inappropriate for them to receive over the Internet – would soon be widely available. *See ACLU*, 521 U.S. at 876-77.

Congress' attempt in COPA to remedy the CDA's fundamental defects is unavailing. Despite attempts to circumscribe the scope of the restriction, COPA still impermissibly burdens constitutionally protected speech because it is not narrowly tailored to advance a compelling government interest, as strict scrutiny requires. Specifically, despite the purported narrowing of its application to "commercial speech" on the World Wide Web and its revised "harmful to minors" test, COPA's attempted protection of minors still would deprive adults of speech that is constitutionally protected as to them, and COPA's affirmative defenses are insufficient to remedy the threat of criminal prosecution and sanctions for entities that offer constitutionally protected speech. For these reasons, among others, the district court entered a preliminary injunction against the enforcement of COPA following a five-day evidentiary hearing, *see COPA I*, 31 F. Supp. 2d at 473, which was upheld by the court of appeals on that ground that COPA imposed an impermissible burden on speech because it essentially would require every Web publisher to abide by the most restrictive "community standards." *See American Civil Liberties Union v. Reno*, 217 F. 3d 162, 165 (3d Cir. 2000) ("*COPA II*").

On May 13, 2002, this Court remanded the case for further consideration, noting that although COPA's use of "community standards" to define material that is harmful to minors did not *alone* render the statute unconstitutional, COPA could suffer from substantial overbreadth on other grounds. *See Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1722 (2002) ("*COPA III*"). On remand, the court of appeals again affirmed the district court's finding that COPA was substantially overbroad and not narrowly tailored. *See American Civil Liberties Union v. Ashcroft*, 323 F.3d 240 (3d Cir. 2003) ("*COPA IV*"). This Court should likewise find COPA to be substantially overbroad and not narrowly tailored and, hence, unconstitutional.

SUMMARY OF ARGUMENT

The Court should affirm the court of appeals' ruling that COPA violates the First Amendment on several grounds: (1) COPA is unconstitutionally overbroad, notwithstanding its limitation to harmful to minors material on the World Wide Web; (2) COPA's vague "commercial purposes" requirement would not cure its unconstitutional reach; (3) COPA's affirmative defenses would impose unconstitutional burdens on both speakers and listeners; and (4) there are alternative actions the government could take that would be less restrictive and more effective than COPA. For these reasons, COPA threatens constitutionally protected speech by mainstream content providers. Accordingly, *amici* urge this Court to affirm the judgment of the court of appeals.

ARGUMENT

I. THE CONSTITUTIONAL STANDARDS APPLIED IN *ACLU v. RENO* TO STRIKE DOWN THE CDA ARE EQUALLY APPLICABLE HERE, AND REQUIRE THAT COPA BE INVALIDATED AS WELL

It is undisputed that COPA, as a content-based regulation, is subject to strict scrutiny and therefore must constitute the least restrictive means of furthering a compelling governmental interest. *See COPA IV*, 322 F.3d at 252; Pet. Br. at 15. *Amici* acknowledge that the government has a compelling interest in protecting minors, and they share the government's concern with the psychological well-being of minors. But "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000). The government thus bears the burden of demonstrating that the regulations at issue are the least restrictive means of accomplishing the government's interest. *See Playboy*, 529 U.S. at 818. *Amici* submit that the government cannot meet this burden with respect to COPA principally because the content-based restrictions that COPA places upon speech on the World Wide Web effectively deprive adults of access to speech that is protected as to them.

A. The Constitutional Flaws This Court Found in the CDA Are Not Remedied by COPA

As explained below, the means by which Congress attempted to remedy the constitutional defects in the CDA that were identified by this Court in *ACLU* are cosmetic in nature and do not rectify the underlying infirmities that continue to pervade – and require the invalidation of – COPA on the ground that it is overbroad and will chill a substantial amount of constitutionally protected expression. *See Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). However appropriate the objective of shielding minors from sexually explicit material that is harmful as to them, COPA runs afoul of this Court's proscription against "ban[ning] speech fit for adults simply because it may fall into the hands of children." *Id.* at 252.

1. COPA's "commercial purposes" requirement unconstitutionally burdens a substantial amount of both commercial and noncommercial speech

Congress's attempt to limit COPA's scope to communications made "for commercial purposes," 47 U.S.C. § 231(a)(1), does not remedy the facial overbreadth of the statute. In drawing this distinction between commercial and noncommercial speech, COPA misapprehends the findings in the CDA litigation, which manifested concern over the censorious impact of federal "minors access" legislation on *all* manner of Internet speech, wherever originated, and whether profit-motivated or not. *See ACLU*, 521 U.S. at 877. Congress no more may regulate constitutionally protected speech flowing to, from, and through Web sites operated "for commercial purposes" than it can those operated for noncommercial purposes. Thus, Congress's narrowing of the statute to apply only to "communication[s] for commercial purposes" "by means of the World Wide Web" does not eliminate COPA's core constitutional infirmity: the fact that there is no practicable means by which the vast majority of those who provide content over the Internet (whether profit-motivated or not) can screen minors from accessing that content while not unduly burdening adults' access to their speech. *See COPA I*, 31 F. Supp. 2d at 495.

Moreover, the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. As this Court made clear in *Burstyn v. Wilson*, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by

the First Amendment." 343 U.S. 495, 501 (1952). *See also Smith v. People of the State of California*, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination [of speech] takes place under commercial auspices.").

It is by no means clear, in any case, that COPA "applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business," as the government asserts (Pet. Br. at 6), or even whether "for profit" would cover material made available for free. *See COPA III*, 122 S. Ct. at 1721 (Kennedy, J., concurring) ("the plain text of [COPA] does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result"). The district court found that, as of 1999, there were 3.5 million Web sites, of which approximately one-third were "commercial," *see COPA I*, 31 F. Supp. 2d at 486, and it found that plaintiffs employ a "variety of different business models" that involve generating revenues, which would render them "engaged in the business" under COPA's standards. *Id.* at 487. The court of appeals likewise held that COPA "would encompass both the commercial pornographer who profits from his or her online traffic, as well as the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the Web site." *COPA IV*, 322 F.3d at 256. Moreover, as noted, the statute encompasses writings, as well as images (*see* Pet. Br. at 34), thus expanding COPA's reach beyond commercial pornographic images.

As the foregoing suggests, the ambiguity as to the scope of COPA's "commercial purposes" renders it unacceptably vague.[3] What is the meaning of "regular" versus "principal," and how does the latter differ from the former? Is a covered entity one that regularly transmits communications that are harmful to minors, or simply one that regularly transmits communications over the Web? These uncertainties as to COPA's intended reach are reflected in the Department of Justice's pre-enactment appraisal of the "commercial purposes" requirement as one of the more "confusing or troubling ambiguities" in the statute. *See* October 5, 1998 Letter from Department of Justice Letter to Honorable

3. 47 U.S.C. § 231(e)(2) provides:

(A) Commercial purposes. A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business. The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

Thomas Bliley, Chairman of House Committee on Commerce ("DOJ Ltr.") at 3-4. The ambiguity of COPA's "commercial purposes" requirement exacerbates its very real potential to chill a substantial amount of constitutionally protected speech.

The government downplays this very real threat to speech, arguing that "Congress' authority to regulate effectively should not depend on a commercial pornographer's business model." Pet. Br. at 33. The government thus displays a profound disregard for the range of *nonpornographic* speech disseminated over the Web by, for example, mainstream book and magazine publishers that is vulnerable under COPA's ill-designed attempt to target commercial pornographers.

2. The revised definition of "harmful to minors" still will result in suppressing protected speech

In *ACLU*, this Court held that the CDA was unconstitutional because it had the impermissible effect of suppressing speech that adults have the constitutional right to receive and transmit to one another. *See ACLU*, 521 U.S. at 874. In this regard, the change from the CDA's "indecent/patently offensive" standard to COPA's "harmful to minors" standard is immaterial from a First Amendment standpoint. To the extent imposition of the "harmful to minors" standard on Web sites will, as with the CDA, have the effect of restricting the offer of, and adult access to, constitutionally protected speech, such regulation is unconstitutional. COPA will have just such an unconstitutional effect.

The "harmful to minors" standard, on its face, is neither clear nor limited as applied to the World Wide Web. For instance, the statutory language "as a whole" leaves ambiguous "whether what is to be judged as a whole is a single image on a Web

page, a whole Web page, or an entire multipage Web site, or an interlocking set of Web sites." *COPA III*, 535 U.S. at 593. The government's contention that an image or file on a Web site is analogous to a page in a magazine or book (Pet. Br. at 28-29) oversimplifies the nature of Internet communication. Whereas content and context in a magazine or book is static, Web content is dynamic and, in many cases, changes daily (if not hourly). The technology applied on the Web, such as hyperlinks and pop-up ads, further affects the juxtapositions of content perceived by Web users and, hence, potentially affects the meaning of "as a whole." *See COPA I*, 31 F. Supp. 2d at 481-84.

Furthermore, COPA's plain language leaves ambiguous the age(s) of minors to which the statute is directed. Prior to enactment of COPA, the Department of Justice itself queried whether material covered by COPA includes that which lacks serious value "for all minors, for some minors, or for the 'average' or 'reasonable' 16-year-old minor?" *See* DOJ Ltr. at 6. The government now argues that COPA should be read to implicitly include an "older minors" standard (Pet. Br. at 32), but the Court should decline the government's invitation to rewrite Congress' definition of "minor" to contradict the plain meaning of the statute. *COPA IV*, 322 F.3d at 254; *ACLU*, 521 U.S. at 884-85 (the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction").[4] Moreover, even if COPA were

4. The government relies heavily upon this Court's review of a Virginia state statute in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), for the proposition that a limiting construction of the term "minor" is appropriate. *See* Pet. Br. at 23-25. However, as this Court emphasized in that case, the Virginia Supreme Court's authority to impose a limiting statutory construction was based upon the authority of the Virginia Supreme Court to construe a state statute. *American Booksellers Ass'n*, 484 U.S. at 395.

rewritten as the government suggests, COPA still would result in an unconstitutional restriction of *adult* viewing of such material.

3. Limiting COPA to the World Wide Web does not eliminate the interference with the First Amendment rights of adults

No different from its change in the standard for covered speech, Congress' attempt to address the overbreadth problem this Court identified with respect to the CDA by "circumscribing" COPA so that it applies only to the World Wide Web, 47 U.S.C. § 231(a)(1), fails because many Web sites feature newsgroups, chat rooms, or other interactive features that are not susceptible to age screening. *See COPA I*, 31 F. Supp. 2d at 483 (noting existence of interactive Web-based chat rooms, e-mail, and newsgroups). As this Court noted in *ACLU*, "there is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." *ACLU*, 521 U.S. at 855 (citations omitted).

Even if it were technologically feasible to block minors from materials that are "harmful to minors," the Court found that there is no way to "block their access to that material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent." *ACLU*, 521 U.S. at 856 (citations omitted). *See also COPA I*, 31 F. Supp. 2d at 483. This problem exists regardless of whether the statute applies to the Internet as a whole or is limited to the World Wide Web. In either case, the regulations will chill protected speech in violation of the First Amendment. *See Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 967-68 (1984) ("[W]here the

defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.").

4. The affirmative defenses do not cure COPA's defects

The affirmative defenses provided by COPA are essentially identical to those contained in the CDA: a content-provider may attempt to restrict minors' access "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1). Although the government argues that COPA's affirmative defenses do not impose an "*unreasonable* burden" on adults (Pet. Br. at 35) (emphasis added), that assertion is at odds with this Court's prior holdings that requiring adults to self-identify and sacrifice their personal privacy to access constitutionally protected speech imposes an "undue burden." *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 746 (1996); *Playboy*, 529 U.S. at 924; *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 307 (1965); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 148 (1943).

Moreover, this Court held with respect to the CDA that the availability of affirmative defenses "do[es] not constitute the sort of 'narrow tailoring' that will save an otherwise

patently invalid unconstitutional provision." *ACLU*, 521 U.S. at 882. *See also American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999). In fact, this Court acknowledged the impracticability of such defenses for many commercial Web sites, particularly in view of the prevalence of Web sites that provide content free of charge:

> There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited. . . . Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

ACLU, 521 U.S. at 857 (citations omitted).[5]

Amici can attest (and the record before the district court affirms) that these realities have not changed. *See COPA I*, 31 F. Supp. 2d at 495 ("implementation of credit card or adult verification screens in front of material that is harmful

5. The district court found that credit card verification services imposed a start-up cost of approximately "$300, plus per transaction fees, for a service that does not automatically verify or authorize credit card numbers on the site to thousands of dollars in start-up costs, plus per transaction fees, to set up online credit card verification." *COPA I*, 31 F. Supp. at 488.

to minors may deter users from accessing such materials and [ ] the loss of users of such material may affect the speakers' economic ability to provide such communications"). Requiring credit card or age-verification screening for access to all potentially "harmful-to-minors" material on covered Web sites would severely burden expression, both of users and of content providers. First, would-be recipients of information will be deterred by pre-access screening requirements. The district court found that "consumers on the Web do not like the invasion of privacy from entering personal information" and that "COPA would have a negative effect on users because it will reduce anonymity to obtain the speech . . . resulting in a loss of traffic to Web sites." *COPA I*, 31 F. Supp. 2d at 487, 491. This is consistent with the experience of many *amici* and the Internet industry in general: many Web users will leave a site if required to register. *See id.* at 487 ("[I]n general, users of the Web are reluctant to provide personal information to Web sites unless they are at the end of an online shopping experience and prepared to make a purchase.").

Responding to this concern, the commercial entities that comprise many of *amici's* constituents have in recent years enhanced and refined their models for doing business on the Web, and the model that is becoming prevalent is the advertiser-supported site that can be accessed by users free of charge. *COPA I*, 31 F. Supp. 2d at 486 ("[T]he most popular business model [on the Web] is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web."). While most sites devoted exclusively to "pornography" do require credit cards or adult verification, advertiser-supported sites are an important part of the array of options available for those seeking more diverse content.

Were advertiser-supported Web sites to employ the adult verification schemes required by COPA, they would likely alienate many users. By effectively forcing users of the Web to register with the sites they choose to access, implementation of the affirmative defenses will require individuals to disclose personal information (*e.g.*, name, address, social security number, credit card) to a third party prior to being afforded access to constitutionally protected speech. Reliance on such systems will create records of individuals' First Amendment activities – records that will be available for use and misuse regardless of statutory provisions seeking to protect them.

Conditioning adult access to constitutionally protected speech on the disclosure of one's identity raises troubling First Amendment and privacy issues. The defenses pose an untenable choice to individuals seeking access to information: protect privacy and forgo access to information, or exercise First Amendment freedoms and forgo privacy. *See American Civil Liberties Union v. Reno*, 929 F. Supp. at 847 ("adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password"). The government's argument that COPA's affirmative defenses pass constitutional muster because "there is no need to identify one's self in person" (Pet. Br. at 38) overlooks the very real threat to privacy that occurs when an individual must surrender credit card information, resulting in the production of a financial record that is linked to address, social security, and bank account information. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 23 ("When users are required to give personally identifying information to verify age, 'the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has

a plausible reason to be concerned that his name is associated with certain types of material.' ") (citation omitted).

As the Third Circuit concluded in striking down a law requiring adults to obtain access codes or other identification numbers in order to place a call to a telephone message service:

> [T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions. . . . [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.

Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785-86 (3d Cir. 1990) (citations omitted). *See also ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (analogous state statute violated the First and Fourteenth Amendments "because it prevents people from communicating and accessing information anonymously") (citations omitted), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).[6]

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6. *See also Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 754 ("[W]ritten notice requirement[s] will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."); *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 693 F. Supp. 332, 338 (E.D. Pa. 1988) (access codes impose a self-identification process, which carries with it "the societal opprobrium associated with dial-a-porn messages and the probable undesirability of having one's name and address at the disposal of message providers and other third parties"), *aff'd*, 896 F.2d 780 (3d Cir. 1990).

The burden is equally severe if viewed from the perspective of the operators of Web sites. As an initial matter, the affirmative defenses provide little comfort in that they do not immunize speakers from criminal prosecution under the Act; they only provide affirmative defenses – on which the speaker will bear the burden of proof – to be asserted following prosecution. As such, they are unlikely to curb the Act's severe chilling effect. As this Court reasoned in *Speiser v. Randall*, 357 U.S. 513 (1958), in holding unconstitutional an analogous procedure that placed an affirmative burden on the speaker of proving that its speech was "legitimate": "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . [which] can only result in a deterrence of speech which the Constitution makes free." *Speiser*, 357 U.S. at 526; *see also Free Speech Coalition*, 535 U.S. at 255 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."); *American Civil Liberties Union v. Reno*, 929 F. Supp. at 855-56; *COPA I*, 31 F. Supp. 2d at 497 (entering preliminary injunction based in part on COPA's "imposition of possibly excessive and serious criminal penalties" and placement of "the burden of establishing an affirmative defense [on the speaker]").

The government attempts to minimize the burden placed on protected speech by analogizing the Internet age verification services to checking driver's licenses at nightclubs, adult bookstores, and movie theaters. Pet. Br. at 36-37. But the financial and administrative burden imposed on a Web site operator to implement an additional software system and related applications is far greater than the simple task of requiring a staff person at a nightclub, bookstore, or

movie theater to adopt another task as part of his or her employment responsibilities. Similarly, the financial burden on a Web site visitor to register for an age verification service, and the inhibiting effect flowing from such registration, is far greater than simply presenting a government-issued driver's license that he or she already possesses.

Moreover, in suggesting that COPA's affirmative defenses should be upheld under the same principles as state harmful-to-minors display laws, the government ignores the fact that federal courts have held that numerous state Internet harmful-to-minors laws modeled on COPA constitute an undue burden on speech.[7] Furthermore, "this Court has yet to rule on the constitutionality of any of these [state display] statutes, which are in any event of little relevance to regulation of speech on the Internet," as Internet communication " 'requires a series of affirmative steps more deliberate and directed than merely' . . . scanning a magazine rack." *COPA III*, 122 S. Ct. at 1724 (Stevens, J., dissenting) (citation omitted); *see also ACLU*, 521 U.S. at 854.

Finally, Web sites, including many created and maintained by *amici*'s constituents, are increasingly employing interactive technology, which permits visitors to communicate with one another in discussion groups and chat

7. *See PSINet Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *see also Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001), *aff'd*, 238 F.3d 420 (6th Cir. 2000); *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd in part*, 342 F.3d 96 (2d Cir. 2003); *American Civil Liberties Union v. Napolitano*, No. CIV 00-0505TUC AM (D. Ariz. 2002) (unreported).

rooms, as well as by electronic mail. To the extent COPA applies to these Web fora, it causes additional burdens. While the employment of interactive technology greatly enhances the First Amendment value of the Internet by permitting listeners seamlessly to transform into speakers and speakers into listeners, implementation of one or more of the verification schemes envisioned by the government threatens to bring such technological strides to a halt.

For one, employment of verification schemes in interactive environments such as chat rooms will destroy the promise of such media of communication by fundamentally interfering with the spontaneity and flow of dialogue that occurs within them. Further, those who sponsor such fora on their Web sites (as do many of the entities represented by *amici*), when faced with the costly and difficult prospect of monitoring the speech occurring on them and the concomitant risk of prosecution under the Act for allowing ill-defined "harmful to minors" speech to transpire, necessarily will think twice about offering such fora. *See COPA I*, 31 F. Supp. 2d at 495 ("[T]here is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups . . . without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors."). These profound shortcomings of COPA's affirmative defenses leave *amici's* speech sponsors, who are representative of many other Internet speakers, with two equally untenable alternatives: (1) offer speech that is unquestionably constitutionally-protected as to adults but which may be construed as "harmful to minors," and thereby risk criminal prosecution and civil penalties under COPA;

or (2) suppress such speech by self-censorship, thereby denying adults access to constitutionally-protected material. Requiring *amici*'s constituents to face this dilemma is antithetical to fundamental First Amendment principles.

II. COPA FAILS STRICT SCRUTINY BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S OBJECTIVES

In addition to the foregoing, COPA also fails strict scrutiny because there are alternative actions the government could take to protect children that would be less restrictive and more effective than the measures provided for in COPA.

It is well established that the government has a compelling interest in protecting children from offensive material. *See*, *e.g.*, *ACLU*, 521 U.S. at 875. *Amici* share that interest, but "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id.* Here, a key issue is whether the government has chosen the *least restrictive means* to achieve its objective of protecting children from "harmful to minors" material online. As *amici* demonstrate below, COPA is neither effective nor the least restrictive means of promoting the government's interest in protecting children from inappropriate material online.

The purpose of COPA is to limit the access of minors to harmful material on the World Wide Web. *See* H.R. Rep. No. 105-775 at 5-6 (1998). However, COPA cannot achieve that goal effectively. First, COPA applies only to Web sites

originating in this country and thus does not even purport to prevent children from viewing material that originates overseas. As of 2002, an estimated 75 percent of the pornography available online – the kind of material COPA was designed to keep from children – originated overseas. NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET 72 (2002), *available at* http://books.nap.edu/html/ youth_internet/ ("NAS" Report"). COPA would have no effect on limiting minors' access to such material. Nor does COPA limit children's access to noncommercial Web sites containing adult material, or to non-Web Internet material, including thousands of newsgroups and chat communications, that contain material that might be deemed harmful to minors. These sources of information constitute a substantial portion of Internet content.

In addition to being ineffective, COPA's content controls are unnecessary in light of the many less restrictive alternatives available to protect children from harmful material online. The authoritative and comprehensive report entitled "Youth, Pornography, and the Internet," commissioned by an act of Congress and issued May 2002 by the National Academy of Sciences, provides an extensive analysis of methods of protecting children on the Internet from content deemed inappropriate. Also relevant is the October 2000 Final Report of the COPA Commission – created by the Child Online Protection Act itself – which arrived at many of the same conclusions later reached by the National Academy of Science study. COPA COMMISSION, FINAL REPORT OF THE COPA COMMISSION (2000) ("COPA Commission Report").

The NAS Report supports the District court's conclusion that there are a variety of less restrictive alternatives that would be more effective than COPA in furthering the governmental interest in protecting children from harmful-to-minors material on the Internet. In some cases, those alternatives involve voluntary efforts by parents to protect their children. In *Playboy*, this Court held that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id.* at 823. As the Court observed, "targeted blocking [initiated by parents] enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815.

This Court should not be deterred from finding that a less restrictive alternative exists merely because it may involve efforts of non-governmental actors. As the Court held in *Playboy*:

> [I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

529 U.S. at 824. *See also ACLU*, 521 U.S. at 877 (noting significance of "user based" alternatives to governmental action). It is the government's burden to show that such a plausible less restrictive alternative would not be effective, s*ee Playboy*, 529 U.S. at 816, and both the COPA Commission

Report and the NAS Report cast serious doubt on the government's ability to meet that burden. The COPA Commission analyzed the effectiveness and the speech restrictiveness of both user-side filtering and blocking technologies and the affirmative defenses set out in COPA. The results indicated that filtering and blocking technologies are *more* effective in protecting children, and less restrictive of First Amendment values, than the credit card and age verification systems identified in COPA. *See* COPA Commission Report at 8, 21, 25, 27.

Similarly, the NAS Report identifies a number of governmental actions that the committee concluded would be more effective than COPA in furthering the governmental interest in protecting children on the Internet, while at the same time being less burdensome on speech. The proposals advanced in the report are precisely the type of governmental actions that the Supreme Court found to be a less restrictive alternative in *Playboy*. As the report notes, "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." NAS Report at 8.[8] The following summarizes some, but not all, of the wide array of alternative public policy recommendations of the NAS committee:[9]

8. *Amici* take no position on the constitutionality of each of the possible governmental actions identified in the NAS Report. Some would be clearly constitutional, while the constitutionality of others would depend – as is common in this area of the law – on the details of drafting and implementation.

9. The COPA Commission also identified a wide range of governmental actions that it believed would substantially contribute to the protection of children on the Internet. Significantly, the passage and enforcement of laws like COPA was *not* included in the Commission's recommendations. Many of the Commission's recommendations are similar to those later made by the National Academy committee. *See* COPA Commission Report at 39-46.

- Concrete governmental efforts to promote Internet media literacy and educational strategies would yield superior results without any significant burden on protected speech. Specifically, the report suggests government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet education material, including public service announcements and Internet programming akin to that offered on PBS. NAS Report at 384-85.

- Government support for industry self-regulation would provide significant protection to children without imposing unconstitutional constraints on First Amendment freedoms. Financial or legal incentives, as well as government coordination and facilitation of private efforts to self-police, could prove effective in addressing the problem. *See id.* at 385. For instance, financial or legal incentives might be used to bolster ISPs' creation of child-safe portals. *See id.* Likewise, government incentives might encourage commercial sources of sexually explicit images to contractually require affiliates posting their content to put that content behind an Internet equivalent of "plain brown wrappers." *See id.* at 216.

- Government support of parents' voluntary efforts to employ technological solutions would provide an effective alternative to COPA. While recognizing that filtering technology is far from perfect, the NAS committee concluded that filters (which may be

installed directly on a computer by end-users or available as a feature offered by an ISP) can have "significant utility in denying access to content that may be regarded as inappropriate." *Id.* at 303.[10]

Amici believe that under the Supreme Court's analysis in the *Playboy* case, the district court's finding that less restrictive alternatives exist should be upheld. In addition to the lower court's conclusions, the NAS Report articulates a host of additional alternative governmental actions, all of which would qualify as less restrictive alternatives under *Playboy*. In light of these alternatives, COPA clearly fails strict scrutiny.

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10. *Amici* would *not* support government-mandated use of technological filtering tools for blocking content. While this Court has upheld mandated implementation of filters on a very narrow basis under limited circumstances in the Children's Internet Protection Act, *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003), *amici* oppose any further implementation of filters by government mandate.

CONCLUSION

Amici respectfully submit that the judgment of the court of appeals should be affirmed.

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APPENDIX: *THE AMICI*

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment. For AAP's members, the Internet creates a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content online. AAP's members are eager participants in this exciting new marketplace.

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. Founded more than seventy-five years ago to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people, ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

Appendix

The Center for Democracy and Technology (CDT) is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user-empowerment tools and technologies.

The Comic Book Legal Defense Fund (CBLDF) is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based, and online commerce in comics is steadily increasing. Past experience has shown that comics are particularly vulnerable to misapplication of "harmful to minors" standards as they are commonly perceived as an inherently juvenile art form. In reality, however, many comics are read by and geared to an adult audience. The CBLDF, therefore, fears that COPA would have a chilling effect on its many members who continue to explore and evolve the comic book art form.

Appendix

The Computer & Communications Industry Association (CCIA) is a nonprofit membership organization for companies and senior executives from diverse sectors of the computer and communications industry. CCIA was established nearly three decades ago to represent its members' vital interests, especially the need to promote competitive and fair open markets, open systems, and open networks. CCIA's member companies range from small start-ups to global leaders that operate in all aspects of the high-tech economy. They include information technology, telecommunications, networking equipment manufacturers, as well as software, Internet, telecommunications, and financial service providers, and others.

The Freedom to Read Foundation (FTRF) is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens. The FTRF and its library members serve both as access and content providers on the Internet. Many member libraries post a diverse array of content on their Web sites, as well as sponsor chat groups. In view of past attempts by some persons to ban literature and reference items from library collections, many of the FTRF's members fear prosecution under COPA should they post materials on the Internet that might be deemed "harmful to minors" in some community. The FTRF is thus concerned that the library patrons served by the FTRF's members will be denied access to constitutionally-protected materials.

Appendix

The Internet Alliance (IA) is a non-profit membership organization of companies for whom the Internet is central to their commercial enterprise. The IA operates exclusively in the 50 United States to promote consumer confidence and trust in the Internet, fostering its full potential as the premier marketing medium of the 21st century. Among the companies represented by IA are e-mail service providers, Internet service providers, marketers, and cable companies.

Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

The National Association of Recording Merchandisers (NARM) is a not-for-profit trade association founded in 1958 which serves the music retailing community in the areas of advocacy, networking, information, education, and promotion. The Association's more than 1,000 members include retailers, wholesalers, distributors, and suppliers of products and services, many of whom conduct business over the Internet. Some of NARM's members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

Appendix

Newspaper Association of America (NAA) represents the interests of more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for eighty-seven percent of the U.S. daily circulation. Many of these newspapers are currently on the Internet. A strong advocate of the press' First Amendment rights, NAA is particularly concerned with protecting the free flow of information over the Internet.

The Publishers Marketing Association (PMA) is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing which more mainstream publishers have not acquired. A number of PMA members have developed Web sites which offer book samples, chat rooms, and other fora for the discussion of their publications. The Internet is an essential tool for marketing and disseminating the unique voices represented by PMA's members and often is a significant source of their publishing income. The imposition of criminal sanctions for communications containing materials deemed "harmful to minors" is a real and tangible threat to these independent publishers, who provide a rich alternative to mainstream publishing houses. The PMA believes that the use of credit card and other user-identification systems defeats the purpose of this democratic medium by discouraging the informal perusal of works otherwise not accessible to the majority of Internet users.

Appendix

The Recording Industry Association of America (RIAA), a national trade association whose member companies produce, manufacture, and distribute more than ninety percent of the sound recordings sold in the United States, is committed to protecting its members' free expression rights across all communications media, including the Internet.

The Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press across all mediums, including the Internet.

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Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF OF *AMICI CURIAE* VOLUNTEER LAWYERS FOR THE ARTS AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Child Online Protection Act, 47 U.S.C. § 231, violates the First Amendment by criminalizing non-obscene speech on the World Wide Web on the basis of its content when the statutory prohibition is not sufficiently tailored to constitute the least restrictive means of achieving the government's interest.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
COPA'S CONTENT-BASED CRIMINAL PROSCRIPTION IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S INTERESTS	5
A. COPA Is Not Sufficiently Tailored To Target Only The Commercial Pornographers That The Government Seeks To Regulate	7
1. COPA's "taken as a whole" provision is not an adequate tailoring mechanism in light of the unique characteristics of the World Wide Web	8
2. COPA's reliance on local community standards imposes an added chill in a medium in which a speaker cannot limit his speech to specific geographical areas	14
3. COPA's "commercial purposes" provision does not sufficiently tailor the statute to commercial pornographers	16
B. COPA's Affirmative Defenses Do Not Mitigate Its Unconstitutional Chilling Effect	20

TABLE OF CONTENTS – Continued

	Page
1. COPA's affirmative defenses impose substantial burdens on constitutionally protected speech that is not commercial pornography	21
2. COPA's affirmative defenses do not protect artists from the opprobrium associated with arrest, indictment, and prosecution	22
3. COPA's affirmative defenses do not shield artists who enable less restrictive alternatives that achieve the government's interest	27
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994).....26

Ashcroft v. ACLU, 535 U.S. 564 (2002) 2, 11, 15

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).....7, 10, 20, 23, 24

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988).....25

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NAACP v. Button, 371 U.S. 415 (1963) 19

New York v. P.J. Video, Inc., 475 U.S. 868 (1986).....25

Reno v. ACLU, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).....12

Reno v. ACLU, 521 U.S. 844 (1997).....*passim*

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Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 6

Tull v. United States, 481 U.S. 412 (1987) 20

United States v. American Library Ass'n, 123 S. Ct. 2297 (2003).....27, 28

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993).....24

United States v. Marion, 404 U.S. 307 (1971).....24

TABLE OF AUTHORITIES – Continued

Page

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).....6, 28

United States v. Williams, 504 U.S. 36 (1992).....24

Virginia v. Black, 123 S. Ct. 1536 (2003).....4, 23

Wisconsin v. Stankus, No. 95-2159-CR, 1997 Wisc. App. LEXIS 138 (Wisc. App. Feb. 13, 1997) 16

Young v. United States, 481 U.S. 787 (1987) 24

STATUTES

18 U.S.C. § 2252B(b).....29

20 U.S.C. § 6777(a)(1).....27

20 U.S.C. § 9134(f)(1).....28

47 U.S.C. § 230(d) 28

Child Online Protection Act, 47 U.S.C. § 231:

§ 231(a)(1).....8, 17

§ 231(a)(3).....20

§ 231(b)(3).....12

§ 231(c)(1)(A) 20

§ 231(c)(1)(B) 20

§ 231(c)(1)(C) 20

§ 231(e)(2).....17, 18

§ 231(e)(5).....12

§ 231(e)(6).....8, 9, 13

TABLE OF AUTHORITIES – Continued

Page

§ 231(e)(6)(A) 14

§ 231(e)(6)(C) 9

47 U.S.C. § 254(h)(6) 28

47 U.S.C. § 503(b)(2)(C) 20

47 U.S.C. § 941 29

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§ 1101(e)(1) 23

§ 1101(f)(1) 28

Mass. Gen. Laws ch. 272, § 28 26

N.Y. Penal Law §§ 70.00, 80.00, 235.21 26

Okl. St. tit. 21 §§ 1040.76, 1040.77 26

S.C. Code Ann. § 16-15-385 26

MISCELLANEOUS

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Commission on Child Online Protection, *Report to Congress* (2000) 21

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Sup. Ct. R. 37.3(a) 1

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Volunteer Lawyers for the Arts ("VLA") is a not-for-profit organization that provides legal advice and assistance to low-income artists and non-profit artistic organizations. VLA's clients include the entire spectrum of New York's arts community, including visual arts, theatre, dance, writing, music, film, photography, graphic arts, performance art, multimedia, fashion design, and crafts. During the last fiscal year, VLA assisted more than 8,500 individual artists and arts organizations on more than 10,000 arts-related legal matters. The question of potential criminal liability for the content of art has arisen repeatedly as VLA provides its clients legal advice. The fear that legitimate artists may get caught in the capacious language of the Child Online Protection Act was confirmed by the United States' representation in an earlier phase of this litigation that photographs produced by noted artist Andres Serrano would be included within the meaning of "materials harmful to minors" and thus subject to criminal prosecution under COPA.

Amicus curiae People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 600,000 members and supporters nationwide. People For has for many years published reports documenting

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

tremendous differences in standards among communities regarding the appropriateness of particular materials for minors.

VLA and People For often file briefs in this Court to provide the views of artists and other persons concerned about limitations on First Amendment freedoms. VLA and People For filed a joint *amicus* brief in support of respondents when this Court last considered the validity of the preliminary injunction in this case in *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

SUMMARY OF ARGUMENT

As written, and even with the interpretive glosses offered by the United States, the Child Online Protection Act ("COPA") is so inartfully drawn that it will inevitably force *amicus* VLA to advise certain of its artist clients to curtail their protected First Amendment speech on the World Wide Web in order to avoid the risk of arrest, prosecution, and possibly conviction under COPA.

A. COPA is not sufficiently tailored to target only the commercial pornographers that the government claims an interest in regulating. COPA's requirement that the material on the World Wide Web be "taken as a whole" in judging its literary, artistic, political, or scientific value for minors does not limit the breadth of the statute. The most natural reading of the statutory text is that each image must be considered alone, and not as part of the web page or web site on which it is posted. The United States appeared to have adopted that reading of the statute in an earlier phase of this litigation when it argued that COPA's criminal sanctions could apply to a web page in the record containing sexually explicit photographic images used in conjunction with an art review. So understood, COPA unconstitutionally denies a factfinder the opportunity to review the context surrounding the image in determining whether it has serious artistic or other value to minors.

The Executive Branch's subsequent, shifting efforts during the course of this litigation to give meaning to the phrase "taken as a whole" highlight the work left undone by Congress in applying that phrase, without elaboration or guidance, to the inherently fluid and non-linear World Wide Web. Persons on the Web have very little control over the context in which their pages (or images on those pages) are viewed. By use of links and bookmarks the public is generally free to go directly to a particular page. Search engines also allow a person to search for and view particular images or photographs on the Web by name, subject, or artist, bypassing the entire context of a web site and web page. The availability of interactive and multimedia presentations on the Web likewise raises novel issues in applying the "taken as a whole" provision. Therefore, the nature of the Web makes it impossible to rely on the unadorned "taken as a whole" approach that has been used to protect the First Amendment rights of artists and others who present graphic sexual content in physical stand-alone works such as books and movies.

COPA's reliance on "community standards" increases the statute's chill of constitutionally protected speech. The United States has maintained that it is free to initiate a COPA prosecution against a speaker anywhere in the United States. Yet no national consensus exists regarding what constitutes sexual material that is harmful to minors. To the contrary, as demonstrated in reports produced by *amicus* People For, this nation contains communities that hold sharply different standards regarding what materials are harmful to minors. Because present day technology does not permit a speaker using the Web to publish his works only to specific geographic locales, COPA's reliance on a "community standard" element to define proscribed material necessarily leads to the most puritanical view of what constitutes prohibited speech governing content for the entire nation.

Finally, the plain meaning of COPA's broad definition of "commercial purposes" extends far beyond pornography vendors – the government's purported target – to include many individual artists and not-for-profit organizations. Even accepting the government's awkward reading of the statute to require that a speaker "regularly" seek to profit from harmful material, the concept of "regularly" communicating is difficult to apply on the World Wide Web. For example, the 1997 art review containing photographs that the government once described as falling within the scope of COPA's proscription is still on the Web, and it thus could be argued that its publisher is "regularly" seeking to profit from that material by not removing it from the web site. The United States' proposed reading thus does not reduce the overbreadth of the statute.

B. COPA's affirmative defenses (*e.g.*, exempting speakers who require viewers to use credit or debit cards or adult access codes) are equally useless in ensuring the statute's constitutionality. Such affirmative defenses provide no practical option for smaller artists and not-for-profit groups that fall within COPA's scope Implementing either form of screening is difficult, expensive, and may require major reorganization of a web site. Moreover, just implementing such screens will reduce traffic to a web site and thus curtail the adult audience for the art. Despite the unduly high burdens, the government has not shown that the defenses, in fact, further its interest in shielding minors from harmful material because, for example, some minors lawfully possess credit cards.

Making the use of credit and debit cards or adult access codes affirmative defenses in a criminal case also improperly shifts the burden of proof from the government to the artist. This Court has recently cautioned that the government may not satisfy First Amendment concerns by requiring a defendant to mount an affirmative defense in order to avoid conviction for speech. *See Virginia v. Black*, 123 S. Ct. 1536 (2003). The affirmative defenses provide no protection from arrest, indictment, and prosecution. An

arrest or the initiation of a criminal prosecution against an artist produces immediate harm and longlasting opprobrium that will not be cured even by a likely acquittal at trial.

Finally, COPA's affirmative defenses are underinclusive. COPA provides no relief for a web site that takes steps to ensure that readily available filtering software will block the web site or that uses warning labels on a site. The United States suggests that filtering software cannot be compared to the criminal prohibitions because obtaining filtering software imposes some burden on parents. But it is a burden that parents shoulder only if they elect to pay to have Internet service in their home and to allow their children unsupervised access to the World Wide Web. The United States fails to note, moreover, the less intrusive steps that Congress has taken to protect minors from harmful materials on the Internet, including encouraging the distribution of filtering software through tax incentives, prohibiting the use of misleading domain names to lure minors to pornographic sites, and creating a safe haven on the Web for parents who wish to allow their minors to be on that portion of the Web unsupervised. The United States has not shown that the broad reach of COPA's criminal sanctions is required to redress whatever lingering problem remains regarding minors having access to "harmful to minors" material.

ARGUMENT

COPA'S CONTENT-BASED CRIMINAL PROSCRIPTION IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S INTERESTS

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231, like its predecessor the Communications Decency Act ("CDA"), which was found unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), criminalizes the communication of constitutionally protected non-obscene expression. As a content-based regulation of protected speech, the

United States must demonstrate that COPA is the least restrictive alternative available to achieve a compelling governmental interest. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Instead, COPA unduly chills significant amounts of constitutionally protected speech by imposing a real threat of arrest and prosecution on artists, even those who could ultimately defend against such a charge at trial.

The World Wide Web is breaking down the barriers between artists and their public. For the first time, relatively unknown artists and small, not-for-profit organizations – historically lacking the means to attract a widespread audience for their endeavors – can instantly reach a worldwide public by placing a "site" on the World Wide Web or establishing "links" from other web sites to their own creative works. The consequence of this technological revolution has been an astounding explosion in both the diversity of artistic expression and the public's access to those creative labors.

Through the Web's unique ability to disseminate their works for both public appreciation and potential purchase, aspiring playwrights, novelists, filmmakers, poets, painters, sculptors, and musicians can sustain and support their artistic endeavors. The ultimate beneficiary of this technological revolution is the public. The convenience and economy of "virtual" visits to a web site maintained by an artist, author, musician, filmmaker, gallery, museum, or library mean that those who were once too poor, too busy, or too far away to view, read, or listen to artistic expression can now freely receive those works of art.

Artists sometimes deliberately provoke their audience, goading us to question ourselves and the world around us. Aristophanes did so in his *Lysistrata*, a bawdy plea for peace, and artists continue to do so today with deliberately disturbing, explicit, and provocative images. Such provocations are by no means unthinking; rather,

they are intended to prod the viewer and society to greater examination and analysis. Such useful provocations will not take place, however, if fear of the government censor comes between society and the best efforts of its artists. Meanwhile, other art, while not intended to provoke, may inadvertently offend the mores of certain communities. It is "well established" that the Constitution protects such speech from suppression even though "it concerns subjects offending our sensibilities." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

Amicus VLA provides legal advice to artists, many of them of limited means and unknown in the general art world. Some of VLA's clients clearly address very controversial subject matter in their works: one client with a web site is the estate of a highly regarded photographer who often dealt with themes of being gay and Asian in Western culture; VLA also represents a number of rap, "hip-hop," and punk artists with sexually explicit music lyrics. Because their work often involves controversial subjects and themes, they have reason to be concerned that unduly broad content-based laws criminalizing speech may be used to target their art.

A. COPA Is Not Sufficiently Tailored To Target Only The Commercial Pornographers That The Government Seeks To Regulate

The United States argues that COPA is directed primarily against commercial pornographers who "already put most of their material behind age verification screens," and that COPA's "principal effect is to require commercial pornographers to put their pornographic teasers behind those screens as well." Pet. Br. 27. Unfortunately, COPA was not narrowly written to apply only to such web sites. Instead, COPA applies to "*any* communication for commercial purposes" on the World Wide Web that includes any "picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is deemed

"harmful to minors" as further defined by the statute. 47 U.S.C. § 231(a)(1), (e)(6) (emphasis added).

1. COPA's "taken as a whole" provision is not an adequate tailoring mechanism in light of the unique characteristics of the World Wide Web

In *Reno v. ACLU*, the Court held that one of the constitutional flaws of the CDA was that it failed to make clear to the public what types of material were proscribed and did not exempt material that adults were constitutionally entitled to receive and address to one another. *See* 521 U.S. at 872, 874. From the view of an attorney attempting to provide legal advice to an artist or other speaker, COPA provides no relief from the breadth and uncertainty of the CDA regarding what a speaker may make available on a web site without fear of prosecution.

a. COPA makes it criminal for a person to make available by means of the World Wide Web "any communication for commercial purposes that is available to any minor and that *includes any material* that is harmful to minors." 47 U.S.C. § 231(a)(1) (emphasis added). COPA provides that, in determining whether "material" is "harmful to minors," a factfinder must "tak[e] the material as a whole" and assess whether it is designed to appeal to the prurient interest, applying contemporary community standards, and whether it "lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. § 231(e)(6).

Because the statute describes the harmful-to-minors "material" as being "include[d]" in a prohibited communication, it is plain that Congress intended that such "material" be viewed as a sub-set of the entire communication. Thus, the most natural reading of the statute is that it is not the "communication" that must be "taken as a whole;" instead, it is only the individual "material." The statutory

text therefore indicates that a factfinder making a judgment about the literary, artistic, political, or scientific value of "material" should consider only the particular "picture, image, graphic image file, article, recording, writing, or other matter," 47 U.S.C. § 231(e)(6), as the "whole."

The United States' attempts to describe how the "whole" would be measured under COPA have not clarified matters. The United States appeared to have adopted the most natural reading of the statute, discussed above, in an earlier phase of this litigation. The government argued that COPA's criminal sanctions apply to a web page in the record displaying photographs from noted photographer Andres Serrano's "A History of Sex" series. Describing the web page as containing "photographs of abnormal sexual acts," the United States contended that a web page from an online magazine *Artnet* (available at www.artnet.com/magazine) "would likely not be excluded from [COPA's] coverage as a matter of law" when the page included some of Serrano's photographs from the series along side a review of those photographs. 00-1293 Pet. Rep. Br. 9 (discussing photographs reprinted at C.A. App. 710-713).

The photographs identified by the United States as "harmful to minors," and thus lacking "serious * * * artistic value for minors," 47 U.S.C. § 231(e)(6)(C), were commissioned by the Groninger Museum and have been displayed in museums and galleries in the United States and elsewhere. These photographs, arrayed alongside an art review on a web site devoted to art, involved serious artistic content for older minors when "taken as a whole" in light of both the web page and the web site. The United States, therefore, did not rely on that whole, but rather relied solely on the image in each photograph, individually

and apart from the remainder of the web page and site to make its judgment.[2]

So understood, COPA thus deprives a factfinder of an opportunity to review the context surrounding the posting of a photograph or other image in determining whether it has serious artistic or other value for minors. That raises the precise problems this Court found fatal in *Reno v. ACLU*, and again, more recently, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), because it makes speech between adults subject to criminal sanctions simply because it contains sexual content.

b. Assuming the government is now correct that Congress intended more than the individual photograph, painting, or other image to be considered in assessing whether the material is "harmful to minors," *e.g.*, lacking in serious literary, artistic, political, or scientific value for minors, the United States does not satisfactorily explain how the statute gives sufficient notice to an attorney or artist as to how a "taken as a whole" approach is to be applied on the World Wide Web.

[2] When the issue of this particular artwork was raised at oral argument before this Court in the earlier litigation phase, the Solicitor General stated that "additional research" had indicated that the photographs were "a small portion of a large compilation" of photographs shown together at an art gallery and that he did not "know how that would come out when all of the evidence came in with respect to that." 00-1293 Oral Arg. Tr. 23 (Nov. 28, 2001). The Solicitor General did not retreat from the government's more general contention that whether that web page violated COPA was an evidentiary issue, apparently for a jury to resolve after arrest and indictment. Moreover, to the extent the United States was suggesting that the context by which it is determined whether a communication on the World Wide Web is prohibited must include how the materials were previously displayed in the physical world, it has not subsequently renewed that contention.

On remand to the court of appeals after this Court's decision in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the United States asserted that the proper "whole" to consider is "often" the "accompanying material on the same Web page itself;" that one can also consider "Web pages through which the user is required to travel to reach the disputed image;" and that "in appropriate circumstances, context may even be provided by material contained on pages on the same Web site – although the other pages must, at a minimum, be 'rationally related' to the disputed image." Pet. C.A. Rep. Br. on Remand 6 & n.2. Focusing again on the web page containing Serrano's photographs, the United States reiterated on remand that those photographs are not, as a matter of law, within COPA's exception for materials having serious literary, artistic, political, or scientific value for minors, and insisted that it would "not be dispositive" that "a sexually explicit image appears as an illustration of a review essay on art." Pet. C.A. Rep. Br. on Remand 6.

Shifting positions again, in its briefs filed in this Court in the current appeal from that remand, the government now asserts (Pet. Br. 28) that the "whole" that must be assessed is "in general" "an entire Web site." The United States claims that, "if an explicit work of art appears on a Web site devoted to serious art, that explicit work of art should be evaluated in the context of the entire Web site." Pet. Br. 29; *see also* Pet. Rep. Br. in Support of Cert. 6 (a person who "posted just one Serrano photograph on the Artnet Web site" would *not* be liable under COPA because "[t]aking COPA's 'in context' requirement into account, [it] would [not] be harmful to minors."). That proposition wholly contradicts its earlier representations that the Serrano photographs are not, as a matter of law, excluded from COPA's criminal prohibition. *See* 00-1293 Pet. Rep. Br. 9; 00-1293 Oral Arg. Tr. 23 (Nov. 28, 2001).

c. All of the government's proposed glosses on the text of the statute are problematic because they fail to

address the unique characteristics of the World Wide Web. The inherently fluid nature of the Web makes it inappropriate to import wholesale the "taken as a whole" approach that has been applied to protect the First Amendment rights of artists and others who present graphic sexual content in physical stand-alone works such as books and movies.

First, the United States relies on a linear understanding of web pages and web sites, in which there is only one way to get to each page. But that is wholly foreign to the World Wide Web. Persons on the Web have very little control over the context in which their pages (or images on those pages) are viewed. By use of links and bookmarks, the public is generally free to by-pass the web site's introductory pages and go directly to a particular page. Indeed, the web pages of third persons linking to an artist's web page can present the artist's web page in a context that the artist does not control, may not intend, and even opposes. "[T]he use of links effectively excerpts that document by eliminating content unrelated to the link." *Reno v. ACLU*, 929 F. Supp. 824, 871 n.11 (E.D. Pa. 1996) (three-judge court) (opinion of Dalzell, J.), *aff'd*, 521 U.S. 844 (1997).

The same is true when a link to the web page is generated by a search engine that provides it as part of a list of purportedly related web pages. Search engines such as Google have features that allow a person to search for particular images or photographs on the World Wide Web by name, subject, or artist. By typing in the words "Andres Serrano" in a search engine that searches for images on the World Wide Web, a viewer is able to link directly to an image, and bypass the entire context of a web site and web page. Although the search engine would not be liable under COPA because it is expressly exempted from coverage, *see* 47 U.S.C. § 231(b)(3), (e)(5), the United States seems to suggest that anyone else linking to the image could be liable under COPA. *See* Pet. Br. 29; *see also* Pet. App. 130a (FF 24) (noting that one of the plaintiffs feared

prosecution for having links in articles on its site to other web sites on the World Wide Web).

This characteristic of the Web distinguishes it in relevant respects from the physical stand-alone works involved in earlier cases that have come before this Court. For example, although an author of a book cannot control whether people read only its erotic passages, at least there is a physical book that can be objectively said to constitute the "whole" communication of the author. That is simply not true of the World Wide Web. As the United States stipulated below, "the fact that each of [the computers storing information] is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge." Pet. App. 126a (FF 12).

We do not suggest that it is impossible to devise a standard that relies on "context" in assessing the literary, artistic, political, or scientific value of materials on the World Wide Web. Congress simply did not address the unique characteristics of the World Wide Web when it enacted COPA. The Executive Branch's shifting attempts during the course of this litigation to give meaning to the phrase "taken as a whole" simply highlights the work left undone by Congress. It is not for the courts to rewrite the statute to resolve these difficult and novel issues. *See Reno v. ACLU*, 521 U.S. at 884-885.

Second, although the United States' brief is focused on photographs, the text of the statute is not limited to images alone, but applies to text, sounds, "or other matter of any kind." 47 U.S.C. § 231(e)(6). The World Wide Web's format, with its integration of text, "hypertext," graphics, and sound, has created a new art. Artists, experimenting with the possibilities, are creating poems, stories, and songs that fuse all these elements. Some artists have web pages where they allow the public to listen to samples of songs or even entire songs, and to read the lyrics at the same time.

A viewer's actions can affect, in unpredictable ways, the context provided by the web site. If the text of the lyrics to one song contains sexual content, should the question whether the text is "harmful to minors" be judged based on the text alone, or in combination with the sound and video clip that can (but need not) be activated at the same time? *Cf. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.) (lyrics and music of album must be considered together to determine whether album is obscene), *cert. denied*, 506 U.S. 1022 (1992). And should the lyrics be viewed along with other songs that were part of the music album when it was originally distributed in the physical form of a compact disc, but which are available only on separate pages of the web site or through links to another web site maintained by someone else? Congress provided no answers to such questions, and the government is silent on the matter. This uncertainty is precisely the situation prohibited under the First Amendment because such ambiguity has the real potential of unconstitutionally chilling substantial amounts of protected speech. *Cf. Reno v. ACLU*, 521 U.S. at 879 ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes.").

2. COPA's reliance on local community standards imposes an added chill in a medium in which a speaker cannot limit his speech to specific geographical areas

Even if the "taken as a whole" provision gave sufficient guidance to artists and other speakers on the World Wide Web, COPA still does not avoid unconstitutionally chilling substantial amounts of protected speech because it does not provide a speaker (or his lawyer) with a clear understanding of which "contemporary community standards," 47 U.S.C. § 231(e)(6)(A), will apply.

In *Reno v. ACLU*, the Court held that one of the flaws of the CDA was that it provided that any communication on the World Wide Web would "be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 878. In *Ashcroft v. ACLU*, various members of the Court expressed different views regarding the appropriate community by which materials on the Web are to be judged under COPA. *See* 535 U.S. at 576-577 (plurality opinion of Thomas, J.) (standards of local community); *id.* at 587 (O'Connor, J., concurring) (standards of national community); *id.* at 590 (Breyer, J., concurring) (standards of national community); *id.* at 596 (Kennedy, J., concurring) (not addressing question); *id.* at 607 n.3 (Stevens, J., dissenting) (standards of local community). Such a divergence of reasonable interpretations, although not alone rendering COPA unconstitutional, raises serious risks for the creative community in determining whether to post works on the World Wide Web.

The beauty and power of the World Wide Web lies in the ability of a speaker to simultaneously address a global audience, and in the ability of a user to access communications from every corner of the nation. Yet no national consensus exists regarding what constitutes sexual material that is harmful to minors. To the contrary, as demonstrated in reports produced between 1985 and 1996 by *amicus* People For the American Way Foundation, this nation contains communities that enforce sharply different standards regarding what materials have sufficient literary, artistic, political, or scientific value for minors. For example, during the 1994-95 school year, Maya Angelou's autobiographical novel *I Know Why the Caged Bird Sings* was removed by a Texas school board from a ninth grade honors English class because of sexual content, while at the same time a Kansas school board approved its use for grades eight through twelve. Similarly, Aldous Huxley's *Brave New World* and J.D. Salinger's *Catcher in the Rye* have both been subject to removal from schools in some communities, but taught in others. Because present day technology does not permit a speaker using the World

Wide Web to publish his works only to specific geographic locales, *see* Pet. App. 128a (FF 18), reliance on a community standard element to define proscribed material would necessarily lead to the most puritanical view of what constitutes prohibited speech governing content for the entire nation.

Indeed, the United States has maintained that it is free to initiate a COPA prosecution against a speaker anywhere in the United States because a communication on the World Wide Web is available nationwide. *See* Pet. C.A. Br. on Remand 33 n.11. Thus, for example, a virtual art gallery or art magazine must consider whether it would face possible arrest, indictment, or prosecution based on the display of a photograph depicting nudity simply because a prosecutor may have probable cause to believe a conservative American town might view such a display of nudity to be "harmful to minors." *See Wisconsin v. Stankus*, No. 95-2159-CR, 1997 Wisc. App. LEXIS 138, at *2-3 (Wisc. App. Feb. 13, 1997) (photograph of a woman with a shirt open to the waist, displaying portion of breast but not displaying nipple, falls within state "harmful to minors" law).

One who places an artistic image or communication on the World Wide Web can have no way of knowing which zealous prosecutors will seek to apply their communities' standards to that work: rather than risk offending a very few, the artist, author, gallery, museum, or literary magazine facing the challenged criminal provisions of the COPA must forsake the opportunity to communicate with the very many.

3. COPA's "commercial purposes" provision does not sufficiently tailor the statute to commercial pornographers

In *Reno v. ACLU*, the Court held that one of the flaws of the CDA was that it failed to distinguish between those

"commercial" web sites that could afford to install technology to verify that their viewers are adults and other site operators. *See* 521 U.S. at 877, 881-882. The United States has argued that, by requiring that the communication be for "commercial purposes," Congress targets COPA at "a billion-dollar" commercial pornography industry "that makes staggering profits through the sale – day-in and day-out – of a wide variety of patently offensive prurient material with no claim at all to serious value for minors." Pet. C.A. Rep. Br. on Remand 3 n.1. Unfortunately, COPA's broad definition of "commercial purposes" extends far beyond the "commercial providers of sexually explicit material" referenced by the Court in *Reno v. ACLU*, 521 U.S. at 881, to include many web sites used by individual artists and not-for-profit organizations that cannot bear the costs of complying with COPA.

COPA's criminal sanctions apply to a person who "makes any communication for commercial purposes." 47 U.S.C. § 231(a)(1). By requiring an inquiry only into whether the "purpose" of the communication was "commercial" (*i.e.*, whether the communication was done with the objective of earning a profit as part of the person's trade or business, *see id.* § 231(e)(2)), the statute includes many artists within its scope. *Amicus* VLA's clients devote extensive time to their web pages, sometimes as a primary means of publishing their works. Many clients tend to be less well-known "starving artists" who do not have access to gallery representation, museum exhibitions, publishing companies, or recording contracts with record labels. In displaying their work on their web pages, one of their objectives is to make potential buyers aware of their work and to enhance their reputation and increase the price of their works. These artists clearly intend to earn a profit as a result of their activities on the World Wide Web and, therefore, have "commercial purposes."

The government attempts to avoid the overly-broad reach of the statute's plain language by urging (Pet. Br. 32-33) that the definition of "commercial purposes" requires a

determination that a speaker "regularly" makes communications that contain harmful-to-minors material with the objective of earning a profit. It is difficult to read COPA's definition of "commercial purposes" to impose the government's proposed "regularity" requirement.[3] But even accepting the government's reading of the statute to require that a speaker "regularly seek to profit from harmful material," Pet. Br. 32, the concept of "regularly" communicating is difficult to apply on the World Wide Web. A web page may remain unchanged on the World Wide Web, available to all, for a number of years. Or, even if superceded by more recent pages (as might occur in an on-line magazine), earlier "editions" of the page remain available on the web site. For example, the 1997 review of the Serrano photographs that the government once described as falling within the scope of COPA's proscription is still on the *Artnet* web site and it thus could be argued

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[3] Congress specified in COPA that a person "shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). A person "who makes a communication * * * that includes any material that is harmful to minors" is "engaged in the business" if the person "devotes time, attention, or labor to *such activities*, as a regular course of such person's trade or business, with the objective of earning a profit as a result of *such activities*." *Id.* § 231(e)(2)(B) (emphases added). The most natural reading of the text would be that the phrase "such activities" refers back to the phrase "makes a communication * * * that includes any material that is harmful to minors."

Because the term "communication" means a web page or web site, the language of the statute treats as "commercial" any speaker that "devotes time, attention, or labor" to his web page or web site "as a regular course" of his business "with the objective of earning a profit" from the web page or web site, so long as the web page or web site "includes any material that is harmful to minors." There is no requirement that the harmful-to-minors material be a substantial part of the speaker's communication. Instead, the speaker's communication need only "include[ ] any" such materials. 47 U.S.C. § 231(e)(2)(B).

that *Artnet* is "regularly" seeking to profit from that material by not removing it from the web site. The United States' proposed reading thus does not reduce the breadth of the statute.

The United States now appears to suggest (Pet. Br. 34) that a party must add *new* harmful-to-minors materials on a regular basis in order to be regularly displaying such materials. It is not at all apparent how the statutory phrase "as a regular course of such person's trade or business" was intended by Congress to distinguish between a static web site that continues to communicate the same harmful-to-minor materials for a long period of time and an actively updated web site that replaces one set of harmful-to-minors materials with another.

The United States contends (Pet. Br. 33-34) that a more tailored definition of "commercial purposes," one that would include only those communications that include harmful-to-minors materials as a "principal part" of their business, would allow the government's true target – commercial pornographers – to take advantages of such "loopholes" and evade COPA's reach. In essence, the United States contends that the government needs a prophylactic criminal rule, one that sweeps in artists and other speakers, in order to address the problems caused by "pornography vendors." Pet. Br. 34. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). This is particularly true in light of the less restrictive alternatives that are available for achieving the government's interests discussed below. *See* pp. 27-30, *infra*.

The cost for an individual artist of guessing wrongly about whether his web site will be viewed as a communication made for "commercial purposes" that includes "harmful to minors" material is high. Each violation can

lead to a six-month term of imprisonment and a $50,000 fine.[4] Even if these were viewed as slight penalties (and from the perspective of the individual they are not), the statute would still be unconstitutional because "even minor punishments can chill protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

B. COPA's Affirmative Defenses Do Not Mitigate Its Unconstitutional Chilling Effect

The United States suggests (Pet. 35, 38-39) that, by providing affirmative defenses to persons who have web sites and web pages if those persons require the use of a credit or debit card or "adult access code, or adult personal identification number" to access their material on the World Wide Web, 47 U.S.C. § 231(c)(1)(A), COPA protects an artist from regulation and prosecution.[5] But such affirmative defenses provide no practical option for many individual artists and not-for-profit groups that nonetheless fall within COPA's definition of "commercial" web sites. Moreover, the defenses provide protection only against ultimate conviction, and not against arrest, indictment, or prosecution. Because one distinctive feature of the artists and not-for-profit arts organizations who comprise *amicus* VLA's clients is their impecuniousness, the economic cost of compliance with the affirmative defenses and the chilling effect of an arrest or prosecution, loom large as VLA advises them with regard to compliance with COPA.

[4] A $50,000 civil penalty may also be imposed for each day of violation, *see* 47 U.S.C. § 231(a)(3), a question submitted to a civil jury to be decided by the preponderance of the evidence, *see Tull v. United States*, 481 U.S. 412 (1987). And a $75,000 civil forfeiture may be imposed for each continuing violation, with no right to a jury trial. *See* 47 U.S.C. § 503(b)(2)(C).

[5] The parties agreed that the other affirmative defenses specified in Sections 231(c)(1)(B) and (C) are not currently available or technologically feasible. Pet. App. 137a (FF 37).

1. COPA's affirmative defenses impose substantial burdens on constitutionally protected speech that is not commercial pornography

COPA's affirmative defenses impose multiple burdens on artists and not-for-profit arts groups. First, it has been the experience of *amicus* VLA's artist clients that implementing either form of screening identified in the statute's affirmative defenses (*e.g.*, credit or debit cards or adult access codes) is difficult, expensive, and may require major reorganization of a site. *See* Commission on Child Online Protection, *Report to Congress* 25 (2000) ("COPA Report") ("it may be difficult or burdensome for small or non-commercial sites to implement card verification systems"); *id.* at 27 (age verification system "imposes high costs on content sources that must install systems and might pay to verify I.D.s.").

Second, as the district court found, implementing such screens will reduce all traffic to a web site, not just that of some minors, and thus will curtail the adult audience for the art. Pet. App. 147a (FF 63) ("implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens"). Indeed, other than a few unusual counter-examples (such as the *Wall Street Journal*), the district court credited testimony that "users will only reveal credit card information at the time they want to purchase a product or service." Pet. App. 136a (FF 36). This is consistent with the experiences of VLA's clients. Even adults who are willing to register and give credit card information to large companies with sophisticated security and privacy protection devices are not willing to provide personal or financial information to an unknown artist. This is especially so if the demand comes before the viewer has seen the content of the site.

Despite the unduly high burdens, the government has not shown that the defenses, in fact, further its interest in shielding minors from harmful material. The district court

noted that the government had "presented no evidence" to contradict testimony introduced by respondents that "a minor may legitimately possess a valid credit or debit card." Pet. App. 140a (FF 48); *see also id.* at 159a; COPA Report, *supra*, at 25 ("some children have access to credit cards"); National Research Council, *Youth, Pornography and the Internet* 349 (Dick Thornburgh & Herbert S. Lin eds., 2002) ("as credit cards (and prepaid cards usable as credit cards) are increasingly marketed to adolescents as young as 13, such [adult verification technologies] will become less useful"). Thus, just as with the CDA, "the Government failed to adduce any evidence" credited by the district court "that these verification techniques actually preclude minors from posing as adults." *Reno v. ACLU*, 521 U.S. at 882.

2. COPA's affirmative defenses do not protect artists from the opprobrium associated with arrest, indictment, and prosecution

a. Apart from the technical and monetary limits that make reliance on the affirmative defenses unavailable to many artists and other speakers, imposing the credit and debit cards or adult access code as affirmative defenses in a criminal case also improperly shifts the burden of proof from the government to the artist.

COPA's prohibition on making a communication that is available to minors and that includes any material that is harmful to minors, standing alone, would be unconstitutional because it "has the invalid effect of limiting the content of adult [communications] to that which is suitable for children to hear." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989). That is because all web pages are "available" to all World Wide Web users and because there is no existing means of excluding all minors, thereby rendering all web sites always "available to any minor" as that term is used in the statute.

COPA attempts to avoid that problem by providing defendants with affirmative defenses if they use means of screening viewers that Congress thought would exclude many minors. But this Court has recently cautioned that the government may not satisfy First Amendment concerns by requiring a defendant to mount an affirmative defense in order to avoid conviction for speech. A statute is unconstitutional under the First Amendment if it permits the government "to arrest, prosecute, and convict a person" who has engaged in presumptively protected speech and who elects to "exercise [his] constitutional right not to put on a defense." *Virginia v. Black*, 123 S. Ct. 1536, 1550-1551 (2003) (opinion of O'Connor, J.); *see also Free Speech Coalition*, 535 U.S. at 255 (statute raises "serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"). That describes COPA.

The United States provides no compelling reason for not imposing the burden on the government to show beyond a reasonable doubt that a web site has not engaged in efforts to exclude minors – instead of imposing the burden on speakers, as COPA does. It is plainly not unworkable to do so. To the contrary, in a simultaneously enacted provision that attempts to encourage web sites to require credit card or adult access code for harmful-to-minors materials by denying them the benefit of an exemption from state and local taxes when they do not do so, Congress did not make the screening a separate affirmative defense. *See* Internet Tax Freedom Act, Pub. L. No. 105-277, div. C, title XI, § 1101(e)(1), 112 Stat. 2681-719 (1998), *reprinted at* 47 U.S.C. § 151 note.

b. Even if an affirmative defense is available and is successfully invoked at trial, the availability of such a defense does not protect an artist from arrest, indictment, and prosecution. "Because [the affirmative defense] in no way shields a content provider from prosecution, it cannot be said that [it] eliminate[s] any chilling effect that the [criminal] provision otherwise would have." *Shea v. Reno*,

930 F. Supp. 916, 944 (S.D.N.Y. 1996) (three-judge court), *aff'd mem.*, 521 U.S. 1113 (1997).

An arrest or the initiation of a criminal prosecution against an artist immediately produces "a wrenching disruption of everyday life." *Young v. United States*, 481 U.S. 787, 814 (1987). Every arrest and prosecution "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). These burdens are felt with force by impecunious individuals such as *amicus* VLA's clients.

"An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a * * * conviction, that his conduct falls within the affirmative defense." *Free Speech Coalition*, 535 U.S. at 255. In obtaining an indictment and proceeding to trial, a federal prosecutor is not constitutionally required to investigate whether a person will be able to rely on COPA's affirmative defenses or report the findings of any such investigation to the grand jury or the court prior to trial. *See United States v. Williams*, 504 U.S. 36, 51-52 (1992) (prosecutor not required to bring exculpatory evidence to the attention of grand jury; "it is the grand jury's function not 'to enquire . . . upon what foundation [the charge may be] denied,' or otherwise to try the suspect's defenses, but only to examine 'upon what foundation [the charge] is made' by the prosecutor").

To the extent a judge is involved at all at these preliminary stages, the government must establish only probable cause that a crime has been committed and need not address affirmative defenses. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (when a judge assesses whether probable cause exists to believe that real property was used to facilitate a felony, "[t]he Government is not required to offer any evidence on

* * * potential defenses a claimant might have"). A court making a probable cause determination may rely on the prosecutor's descriptions of the "content and character" of materials and need not view them itself in determining whether there was a "fair probability" that the speech is illegal. *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 n.5, 875-876 (1986). Indeed, under the United States' view, as expressed in argument in another case this Term, "[a]s long as there's probable cause to go forward, the prosecutor can go forward with the charges" even if the prosecutor "plainly on the face of it doesn't have enough evidence to convict." *Maryland v. Pringle*, No. 02-809 Oral Arg. Tr. 27 (Nov. 3, 2003). The prospect of what any of the nearly 100 United States Attorneys and approximately 5,000 Assistant United States Attorneys nationwide may find sufficient in order to arrest, indict, and prosecute an individual for a violation of COPA imposes an unconstitutional chill on speech.

As the United States notes (Pet. Br. 39), the Court has adopted a general presumption that federal prosecutors will act in good faith. But this Court has been unwilling to rely on presumptions of good faith on the part of government officials in determining whether a statutory scheme complies with the First Amendment. *See Reno v. ACLU*, 521 U.S. at 872 ("the 'risk of discriminatory enforcement' of vague regulations" through criminal sanctions poses special First Amendment concerns); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (rejecting request "to presume that the mayor will deny a permit application" only for valid reasons because the presumption that "the mayor will act in good faith" is "the very presumption that the [First Amendment] doctrine forbidding unbridled discretion disallows").

Nor can this Court consider COPA in isolation from its state and local counterparts. A number of States have enacted their own statutes governing material on the World Wide Web that are similar to COPA, and more would likely do so if this Court were to sustain COPA's

facial constitutionality. Thus, a speaker might be haled into court in a number of jurisdictions to answer for the same web page, subject to an array of harsh penalties.[6] This panoply of local legislation may unleash the uncabined discretion of an array of elected local prosecutors to initiate prosecutions against an artist even if they do not expect to prevail at trial. *Cf. Albright v. Oliver*, 510 U.S. 266 (1994) (splintered decision regarding what limits, if any, are imposed by Constitution on initiation of prosecution).

The human body, nudity, and sex have been, are, and understandably always will be, important components in all genres of artistic expression. Sexual symbols, in the form of phallic sculptures and female figures with overemphasized breasts and buttocks, abound in ancient as well as contemporary art as symbols of the fertility of the land and its people. Likewise, the human body has been a departure point for dance and visual art from the earliest times to the present day. Finally, discussions and depictions of nudity and sex are entangled in political and cultural disputes regarding gender, race, and homosexuality. The polarizing nature of such issues increases the risk that artists will become the targets of local prosecutions motivated by factors other than legitimate law enforcement interests.

[6] *See, e.g.*, Mass. Gen. Laws ch. 272, § 28 (a felony punishable by up to five years in prison, a $10,000 fine, or both); S.C. Code Ann. § 16-15-385 (a felony punishable by up to five years in prison, a $5,000 fine, or both); N.Y. Penal Law §§ 235.21, 70.00, 80.00 (a felony punishable by up to four years in prison, a $5,000 fine, or both); Okl. St. tit. 21, §§ 1040.76, 1040.77 (a misdemeanor punishable by fines of up to $1,000 for each day the material is displayed or continues to be displayed). *But see* Pet. C.A. Rep. Br. on Remand 14 n.10 (federal government suggesting that state statutes may be barred under Dormant Commerce Clause analysis).

3. COPA's affirmative defenses do not shield artists who enable less restrictive alternatives that achieve the government's interest

a. COPA provides no relief for a web site that takes steps to ensure that readily available filtering software will block the web site. Record evidence demonstrated that, while "not perfect," widely available "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. App. 160a. When filtering software is installed, a computer owner "can set such software to block categories of material, such as 'Pornography' or 'Violence'" and when a computer user "tries to view a site that falls within such a category, a screen appears indicating that the site is blocked." *United States v. American Library Ass'n*, 123 S. Ct. 2297, 2302 (2003) (plurality opinion). This Court recently credited Congress's conclusion that "filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent" minors from accessing pornography. *Ibid.* Indeed, use of filtering technology shields minors even from potentially harmful content on foreign-hosted Web sites, a laudable achievement that COPA cannot match. Pet. App. 160a; *see* COPA Report, *supra*, at 21 ("filtering can be effective in directly blocking access to global harmful to minors content on the Web, in newsgroups, in email and in chat rooms").

Thus, parents who have elected to have Internet service in their home have the ability currently to protect their children from potentially harmful content on the World Wide Web, just as they have the ability to control access to any other adult-oriented material that they may choose to bring into their homes. Moreover, other places children are likely to have access to a computer, such as schools and libraries, often are required to use filtering software. *See* 20 U.S.C. § 6777(a)(1) (schools receiving

federal assistance); 20 U.S.C. § 9134(f)(1) (libraries receiving federal assistance); 47 U.S.C. § 254(h)(6) (same); *American Library Ass'n*, *supra*, (upholding 20 U.S.C. § 9134(f)(1) and 47 U.S.C. § 254(h)(6) from facial First Amendment challenge).

The United States suggests (Pet. Br. 39) that filtering software cannot be compared to the criminal prohibitions of COPA because obtaining filtering software imposes some burden on parents. But it is a burden that parents shoulder only if they elect to pay to have Internet service in their home and to allow their children unsupervised access to the World Wide Web. *Cf. Playboy Entm't Group*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time.").

The United States fails to note, moreover, the less intrusive steps that Congress has taken to ameliorate any burdens parents may bear. First, Congress has conditioned Internet provider's exemption from state and local taxes on their willingness to provide filtering software. *See* Internet Tax Freedom Act, Pub. L. No. 105-277, div. C, title XI, § 1101(f)(1), 112 Stat. 2681-719 (1998), *reprinted at* 47 U.S.C. § 151 note. A separate federal statute requires all providers to notify their customers of the availability of "parental control protections (such as computer hardware, software, or filtering services) * * * that may assist the customer in limiting access to material that is harmful to minors" and to "identify, or provide the customer with access to information identifying, current providers of such protections." 47 U.S.C. § 230(d); *see also* COPA Report, *supra*, at 17 ("Internet companies have made substantial efforts to make these online information resources available.").

b. Congress has taken additional steps to address the government's concerns (Pet. Br. 7-8, 20) that web site operators manipulate the World Wide Web so that minors are exposed to pornographic web sites even though minors do not intend to access such materials. *But see Reno v.*

ACLU, 521 U.S. at 869 (crediting district court's finding of fact that users "seldom encounter" sexually explicit material "'by accident'" and "'the odds are slim' that a user would come across a sexually explicit site by accident"). Congress has enacted a criminal prohibition tailored to that particular concern. *See* 18 U.S.C. § 2252B(b) ("Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this title or imprisoned not more than 4 years, or both."). Federal agencies are also relying on existing enforcement authority to prevent unfair and deceptive practices that have the effect of luring minors to sexually explicit material on the World Wide Web. *See* Thornburgh & Lin, *supra*, at 80, 108-109 (describing enforcement efforts of Federal Trade Commission).[7]

In addition, Congress has required the creation of a new "domain," *i.e.*, a section of the World Wide Web, that consists entirely of material considered suitable for minors 13 years old and younger, now operating at www.kids.us. *See* 47 U.S.C. § 941; *see also* COPA Report, *supra*, at 30 ("This approach could be an accessible and generally effective way to protect children from harmful to minors content.").

Given the increased availability of filtering software, the criminal and civil sanctions for using misleading domain names, and the existence of a safe haven for parents who wish to allow their minors to be on the World

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[7] COPA may, in fact, cause more inadvertent exposure to sexual content by failing to provide an affirmative defense for persons who attempt to prevent children from viewing material on their web page by use of warning labels. Indeed, COPA may discourage such efforts if, as the United States suggests (Pet. Br. 29), attempts to segregate materials that may be harmful to minors to a portion of a web site and to warn that they are "xxx pictures" (which could be even more easily filtered out), would be treated as evidence of pandering.

Wide Web, the United States has not shown that the overly broad reach of COPA's criminal sanctions is required to redress whatever lingering problem remains regarding access by minors to "harmful to minors" materials.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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